The likelihood of success on the merits is the "main bearing wall" of the test. *Corporate Techs., Inc. v. Harnett,* 731 F.3d 6, 9 (1st Cir. 2013). To demonstrate a likelihood of success, plaintiffs must establish more than a "mere probability of success;" instead, they must show a "strong likelihood they will prevail." *Sindicato Puertorriqueno de Trabajadores v. Fortuno,* 699 F.3d 1, 10 (1st Cir. 2012).

This Court reviews the grant or denial of a TRO for abuse of discretion. *Jean v. Mass. State Police,* 492 F.3d 24, 26 (1st Cir. 2007). Separately, findings of law when determining the likelihood of success on the merits are reviewed *de novo*. *OfficeMax, Inc. v. Levesque,* 658 F.3d 94, 97 (1st Cir. 2011).

ARGUMENT

1. The plaintiff failed to prove a substantial likelihood of success on the merits.

The Plaintiff has not proved a substantial likelihood of success on the claim that BCHS violated F.M.'s First Amendment rights. To the contrary, the court below correctly denied the Plaintiff's motion for a TRO. First, F.M.'s TikTok video falls within the exception the Supreme Court articulated in *Tinker* since the video could reasonably be foreseen to disrupt school activities. Second, the Plaintiff's argument that BCHS cannot regulate off-campus speech, like F.M.'s TikTok, fails. The Supreme Court has recognized schools may impose proportionate and reasonable punishment on certain kinds of off-campus speech, like F.M.'s TikTok. Finally, courts have held school administrators should be given deference in their disciplinary decisions.

A. F.M.'s TikTok video was reasonably foreseen to substantially disrupt school activities.

Students do not lose their constitutional rights at the "schoolhouse gate." *Tinker,* 393 U.S. at 506. Yet First Amendment rights may be limited "in light of the special characteristics of the school environment." *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260, 266 (1988). School

officials may restrict student speech if they reasonably "forecast substantial disruption . . . of school activities." *Tinker*, 393 U.S. at 514.

Courts analyze all facts known to the administrator at the time of discipline to determine whether they acted reasonably. *Norris ex rel. A.M. v. Cape Elizabeth Sch. Dist.*, 969 F.3d. 12, 31 (1st Cir. 2020). Given the school's policy on speech threatening the school community and the public nature of the TikTok, Principal Tran reasonably determined that F.M.'s speech would cause substantial disruptions of school activities.

Content advocating for threats upon a school's campus implicates legitimate security concerns. A school has a duty to maintain safety on school grounds. *See Lowery v. Euverard*, 497 F.3d 584, 596 (6th Cir. 2007). BCHS takes this responsibility seriously and maintains a "zero-tolerance policy" for threats or suggestions of violence against any member of the school community. J.A. 4. Tran assessed that F.M. violated this policy. F.M. not only suggested threats of violence, but actively encouraged it. She directly targeted the school community by asking others to "threaten to shoot a few teachers." J.A. 36.

This violation would result in a substantial disruption of school activities. The school administrative guidelines hold that the school must enter a Level Two Lockdown whenever there is a violation of the zero-tolerance policy. J.A. 15-22. At a minimum, that would involve closing the school entrance and exits, requiring students to remain in their classrooms during class and lunch periods, informing the local police station to send two patrols to the school, informing all the students' parents, addressing any calls or concerns parents have, cancelling any events both during and after school for that day, and consulting with the local police department and superintendent's office to take any other steps deemed necessary. J.A. 18-22.

Tran was familiar with these policies and knew that they would be applied without

exception. The national concern of school shootings and gun violence only lend support to the reasonableness of her actions. See *LaVine v. Blain Sch. Dist.*, 257 F.3d 981, 987 (9th Cir. 2001) (noting the importance of context and emphasizing the national concern around school shootings in assessing the school's reasonableness). Given the unfortunate frequency of school gun violence, the zero-tolerance policy was strictly enforced by BCHS. Thus, Tran reasonably foresaw the chain reaction that F.M.'s TikTok would create, resulting in substantial disruption of school activities.

It is widely accepted that school administrators may punish individuals who threaten the school environment. While the First Circuit has yet to address whether schools may suspend a student who threatened the school community, other circuits have consistently upheld such penalties. For instance, in *Wisniewski v. Board of Education*, the Second Circuit upheld the suspension of a student for threatening conduct. In that case, a student had sent an I.M. message with an icon "depicting and calling for the killing of his teacher." 494 F.3d 34, 38 (2007). While administrators determined that the student had no truly violent intent, Court concluded that, for this conduct, "*Tinker* affords *no* protection against school discipline." *Id.* at 39 (emphasis added).

Similarly, in *Wynar v. Douglas County School District*, the Ninth Circuit upheld a suspension for a student who threatened teachers on a MySpace page. 728 F.3d 1062, 1065 (2013). The Ninth Circuit decided that, considering the violent nature of the message, "school officials have a duty to prevent the occurrence." *Id.* at 1070. The court held it was reasonable to take the student's message seriously because "the harm described would have been catastrophic if it occurred." *Id.* at 1071. Therefore, it was reasonable school would be disrupted as "considerable time" would be dedicated to the fallout. *Id.* Other circuits have ruled in the same way. *See, e.g.*, *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d, 379, 393 (5th Cir. 2015) (noting a "paramount need" to address threats against the school community).

The Plaintiff argues that the suspension is unreasonable because of the TikTok's context. She argues that F.M. is a high performing student with no disciplinary record or history of behavioral issues, suggesting she would be unlikely make threats. J.A. 60-61. Furthermore, she claims F.M. was clearly joking, noting the laughter and dance in the video as well as the "ludicrous" suggestion that someone would call in a threat every single day. J.A. 62-65. The Plaintiff argues these elements make it difficult to believe that anyone would take her seriously so forecasting a substantial disruption to school activities was unreasonable. J.A. 67. Both of these responses fail.

To start, being a high performing student is not a license to encourage classmates to threaten teachers. Courts have upheld a school's disciplinary action as reasonable even when the student was a well-regarded member of the school community. *Doninger v. Niehoff*, 527 F.3d 41, 44-45 (2d Cir. 2008) (upholding a Student Council leader's punishment for a vulgar blog post concerning school administrators). Moreover, whether F.M., individually, would threaten teachers misses the point. She posted on a public TikTok account. She actively encouraged and solicited threats. Her statements were for a broader audience. The issue is not just whether F.M. is inclined to act on her words; rather, whether any viewer might also be inclined. The potential scope of the threat poses a greater problem to BCHS. Even if it were *known* that F.M. was not a threat, her actions created more than two hundred *unknowns*, because each person who saw her video might have called in a threat. The school does not know how her followers, including dozens of BCHS students, will respond. Given both the violent subject matter and the scope of the issue, Tran reasonably predicted the school would take serious measures, disrupting daily activities.

The alleged "joking nature" of the video, suggested by laughter and dancing, is also immaterial. Even if F.M. intended the video to be a joke, her intent is irrelevant. *See Norris ex rel. A.M.*, 969 F.3d at 25 (citing *Cuff ex rel. B.C. v. Valley Cent. Sch. Dist.*, 677 F.3d 109, 113 (2d Cir.

2012)). The only relevant inquiry is whether there was a reasonably foreseeable disruption to the school based on her speech. *Id.* There are several cases where courts have held that even if a student's threats against the school community were meant as jokes, the school's disciplinary action was appropriate. *See, e.g.*, *Wynar*, 728 F.3d at 1066 ("We do not discredit [the student's] insistence he was joking; our point is that it is reasonable for Douglas County to proceed as though he was not.").

Furthermore, the Plaintiff's argument betrays a misunderstanding of the medium of TikTok. The mere presence of dancing and laughter does not suggest that no one would take F.M.'s words seriously. TikToks frequently juxtapose serious messages with comedic elements. *See, e.g.*, Frankie Lantican, *A TikTok Trend Has People Sharing Traumatic Experiences to a Pop Song*, Vice, Dec. 7, 2020. The dancing and laughter alone do not make it clear F.M. was joking.

Moreover, even if it would be unreasonable to believe a student would call in a threat every day to cancel school forever, it is reasonable to believe that students may call in a threat at least one time. Some of the comments to F.M.'s TikTok named specific teachers to target while others expressed strong enthusiasm. J.A. 13-14. At least one student feared that threats would be called to the school. J.A. 5. Therefore, it was reasonable for the school to believe that at least one threat may be called, requiring disruptive actions.

Principal Tran was aware of all of the above facts. When making her decision, she reasonably foresaw that F.M.'s solicitation of threats would disrupt the school. These facts indicate that the Plaintiff has not demonstrated a strong likelihood she will prevail on the merits.

B. F.M.'s TikTok video is within the range of off-campus activity that BCHS can regulate.

The Supreme Court has held that schools can regulate some off-campus behavior. *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 141 S. Ct. 2038, 2045 (2021). The Plaintiff argues that schools

cannot regulate this kind of off-campus speech. J.A. 68. The District Court rejected Plaintiff's claim. J.A. 47-50. The District Court held that, while there is no First Circuit standard for when a school can regulate off-campus speech, it would be "faulty" if schools cannot regulate speech like F.M.'s. J.A. 47. In fact, the District Court noted that "if schools *can* regulate some forms of off-campus speech, speech like F.M.'s must plainly be within the school's ambit." J.A. 50.

The District Court's analysis is bolstered by the fact that many of the reasons the *Mahanoy* Court used to caution against off-campus speech regulation do not apply to this case. The Supreme Court noted that courts should be skeptical of attempts to regulate off-campus speech since it would amount to constant regulation of a student's speech. *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2047. Particularly for "political or religious speech," the school has a "heavy burden" to justify judicial action. *Id.* This case, however, does not involve political or religious speech. It involves a student expressing they do not wish to attend school and encouraging others to threaten teachers to cancel school. The fear of constant regulation is also mitigated by the fact the F.M.'s speech is directly addressing and targeting the school, implicating their direct interest. Not all speech would be expected to do the same, so a fear of constant regulation would be unwarranted.

The *Mahanoy* Court also highlighted a school's duty to protect unpopular ideas and facilitate the "marketplace of ideas." *Id.* While a pivotal part of a school's educational mission, "the marketplace of ideas" is not implicated here. If F.M. had expressed an unpopular opinion about gun violence, public schools, or any school policy, it would be a different matter. But that was not the case. At most, she expressed a view that vacation is better than school. While she is free to express that view, it did not result in her suspension. Rather, Tran's concern was F.M.'s call for students to make threats. The "educational" value of F.M.'s statement does little to diminish the school's interest in her call for threats on teachers.

These factors suggest that it would be appropriate to regulate F.M.'s TikTok. While neither the *Mahanoy* Court nor the First Circuit have outlined the limits of off-campus speech schools can regulate, the four circuits have crafted rules to determine whether a school's off-campus regulation of student speech is appropriate. Under any of these standards, BCHS would be permitted to suspend F.M. for her TikTok.

The Fourth Circuit, for instance, held that where "speech has a sufficient nexus with the school," school administrators can regulate off-campus speech. *Kowalski v. Berkely Cnty. Sch.*, 652 F.3d 565, 577 (2011). The court held that a MySpace page dedicated to harassing and bullying another student could be grounds to suspend a student. *Id.* Despite the fact the webpage was created off-campus, the speech could "reasonably be expected to reach the school or impact the school environment." *Id.* at 573. The student also knew that the "fallout from her conduct and the speech within the [MySpace page] would be felt by the school itself." *Id.* All of these concerns apply with equal force to the present case. F.M. posted a public TikTok to an account over eighty of her classmates follow. She understood that her audience included her classmates and it was reasonable that the consequences of her conduct would be felt by the school community, especially if one student elected to call in a threat. Her solicitation of threats against the school community and the audience the message was delivered to establish a nexus to the school, satisfying the Fourth Circuit rule.

Both the Second and Eighth Circuits have held schools can regulate off-campus speech that would fail the *Tinker* test and if it is reasonable that the speech will reach the school community. In *Doninger v. Niehoff*, the Second Circuit held that a disruptive blog posting about a school activity "was reasonably foreseeable . . . to reach school property." 527 F.3d 41, 50 (2d Cir. 2008). F.M.'s TikTok meets this standard as well. A TikTok, targeting the school community and

sent to those in the school community, would foreseeably reach the school. Similarly, in *S.J.W. v. Lee's Summit R-7 School District*, the Eighth Circuit upheld a student's punishment for their vulgar blogsite mocking black students and discussing fights at the school. 696 F.3d 771, 773 (8th Cir. 2012). The court held that the "posts were directed at [the school]" and "could reasonably be expected to reach the school or impact the environment." *Id.* at 778. Under this standard, Tran's actions were permissible.

Finally, the Ninth Circuit, while not creating a broad rule, held that at the minimum, "when faced with an identifiable threat of school violence, schools may take disciplinary action in response to off-campus speech that meets the requirements of *Tinker*." *Wynar*, 728 F.3d at 1069. On its face, F.M.'s TikTok meets this standard. She created an identifiable threat of school violence by actively calling for others to make threats against the school. And, as previously established, her TikTok would foreseeably cause substantial disruption to the school. Under the Ninth Circuit rule, Tran thus acted appropriately and lawfully by suspending F.M. for her actions.

The Plaintiff argues that the school's interest in F.M.'s off-campus speech is diminished because it is not apparent that she is referring to BCHS. As was the case in *Mahanoy*, F.M. "appeared outside school hours from a location outside the school" and she "did not identify the school in her posts." *Mahanoy Area Sch. Dist.*, 141 S.Ct. at 2046. This argument fails since, unlike in *Mahanoy*, F.M.'s audience understands that she is referring to BCHS. Her profile is followed by all her classmates and dozens of other students at her school. J.A. 1-3. In the past, F.M. has also posted several other TikTok's from inside BCHS or referring to BCHS. J.A. 6-12. So, even if not immediately apparent, it was apparent to her audience which school community she was referencing. Her followers' implied understanding is enough to implicate the school's concern since it was plain to her viewers that she intended threats to be called to BCHS. Thus, the off-

campus nature of F.M.'s speech does not affect the BCHS' ability to punish her for it.

C. This Court should provide deference to Tran's decision to suspend F.M.

The Supreme Court has repeatedly held that courts should provide deference to the decisions of school administrators. Understanding the unique position of school administrators, the Court has "cautioned courts in various contexts to resist substituting their own notions of sound educational policy for those of the school authorities which they review." *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Col. Of Law v. Martinez*, 561 U.S. 661, 686 (2010). In fact, the Court has made clear that the public education system "*relies* necessarily upon the discretion and judgement of school administrators and school board members." *Wood v. Strickland*, 420 U.S. 308, 326 (1975) (emphasis added).

Thus, courts should respect the role of school administrators and defer to administrators' decisions on student speech so long as the judgement is "reasonable". *Norris ex rel. A.M. v. Cape Elizabeth Sch. Dist.*, 969 F.3d. 12, 31 (1st Cir. 2020). Given F.M.'s active call for threats against the school, the public medium, and the concerning nature of the threats, Tran acted reasonably by forecasting disruption at the school and suspending F.M.

CONCLUSION

For the preceding reasons, the Plaintiff has failed to demonstrate a likelihood she will succeed on the merits. For that reason, the lower court decision should be affirmed.

Applicant Details

First Name	**Karen**
Last Name	**Wang**
Citizenship Status	**Other: nonimmigrant alien in F-1 status**
Email Address	**kw2923@columbia.edu**
Address	**Address** Street **4 Saint Nicholas Terrace, Apt 10** City **New York City** State/Territory **New York** Zip **10027** Country **United States**
Contact Phone Number	**9177675270**

Applicant Education

BA/BS From	**University of Waterloo, Canada**
Date of BA/BS	**August 2020**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 1, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Columbia Human Rights Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Foundation Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Singh, Riti
rps2163@columbia.edu
Motaparthy, Priyanka
priyanka.motaparthy@law.columbia.edu
Shapiro, Steven
stvnshapiro@gmail.com

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Karen Wang
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(917) 767-5270
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June 12, 2023

The Honorable Kiyo Matsumoto
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Dear Judge Matsumoto,

I am a recent graduate and former member of the *Human Rights Law Review* at Columbia Law School. I write to apply for a clerkship in your chambers beginning in 2025.

I hope to pursue a career in public interest and aim to gain a greater understanding of our federal court system by serving as a clerk. I believe the practical legal experience gained through working with a judge in chambers is second to none. At Columbia, I have honed my research and writing skills by working as a research assistant, writing memos to assist in advising Ukraine on international claims and reparations, and crafting legal briefs for the Human Rights Clinic. I also served as a staff member of the *Human Rights Law Review* in my 2L year. I would love to have the opportunity to apply these skills in a clerkship position.

Enclosed please find a resume, transcript, and writing sample. Also enclosed are letters of recommendation from Professors Steven Shapiro (212 549-2611, stvnshapiro@gmail.com), Priyanka Motaparthy (212 854-1571, priyanka.motaparthy@law.columbia.edu), and Professor Riti Singh (rps2163@columbia.edu)

Thank you for your consideration. Please do not hesitate to contact me should you need any additional information.

Respectfully,

Karen Wang

KAREN XINYI WANG

4 Saint Nicholas Terrace, New York, NY 10027
(917)-767-5270 • kw2923@columbia.edu

EDUCATION

Columbia Law School, New York, NY
J.D. May 2023
Honors: Harlan Fiske Stone Scholar
Activities: *Human Rights Law Review*, Staff Editor
Contracts Teaching Assistant to Professor Jody Kraus (Fall 2021)
Foundation Moot Court Student Editor
International Refugee Assistance Project
Sanctuary for Families
The Bronx Defenders
Asian Pacific American Law Student Association, Public Interest Chair

University of Waterloo, Waterloo, CANADA
B.AS, received August 2020
Major: Architecture
Awards: Jo Beglo Book Prize for highest average in cultural history courses

EXPERIENCE

Human Rights Clinic, New York, NY September 2022 – April 2023
Clinic Student on Armed Conflict and Accountability Team
Worked on a project focused on achieving accountability for war crimes in Yemen in partnership with Mwatana (a Yemen-based NGO). Compiled evidence and conducted research into potential applications of international humanitarian law to the conflict. Conducted government advocacy and travelled to D.C. to meet with members of Congress and the State Department. Wrote a blog post to further publicize accountability efforts.

Cleary Gottlieb Steen & Hamilton, New York, NY May – August 2022
Summer Associate
Worked on projects in various practice groups including litigation, arbitration, IP, and M&A. Wrote a research memo and helped draft a brief for a sovereign debt action as counsel for the government of Argentina. Conducted research into free speech violations in Vietnam and helped draft a report for TrialWatch, an initiative from the Clooney Foundation for Justice.

Professor Olatunde Johnson, Columbia University
Research Assistant January – April 2022
Conducted research and drafted a memo analyzing the legal issues surrounding Black Lives Matter litigation, anti-protest laws, and anti-CRT laws. Focused on free speech issues and constitutional law. Read and summarized various cases and state and federal laws and extracted pertinent legal and policy implications.

Center for Public Research and Leadership, New York, NY
Summer Associate May – August 2021
Worked on a policy-oriented project for a school district client. Conducted research about innovative school governance models and analyzed the impact it had on school growth and student outcomes. Interviewed various school officials involved, compiled policy research, presented progress and ideas to the client, and ultimately wrote a report for the client to utilize in re-working their education policy.

LANGUAGES: Mandarin (fluent)

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CLS TRANSCRIPT (Unofficial)

06/02/2023 14:12:18

Program: Juris Doctor

Karen Xinyi Wang

Spring 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6341-1	Copyright Law	Wu, Timothy	3.0	B+
L6256-1	Federal Income Taxation	Raskolnikov, Alex	4.0	A-
L9233-1	Human Rights Clinic	Knuckey, Sarah Maree	2.0	A-
L9233-2	Human Rights Clinic - Project Work	Knuckey, Sarah Maree	3.0	A-
L9175-2	S. Trial Practice	Gregory, Naima; Zien, Marnie	3.0	B

Total Registered Points: 15.0

Total Earned Points: 15.0

Fall 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L9233-1	Human Rights Clinic	Jost-Creegan, Kelsey; Khawaja, Bassam M; Knuckey, Sarah Maree	4.0	B+
L9233-2	Human Rights Clinic - Project Work	Jost-Creegan, Kelsey; Khawaja, Bassam M; Knuckey, Sarah Maree	3.0	A-
L8026-1	P. International Claims and Reparations	Pearsall, Patrick W.; Sharpe, Jeremy	2.0	CR
L6274-1	Professional Responsibility	Mastando, John	2.0	B+
L8990-1	S. Current Issues in Civil Liberties and Civil Rights	Shapiro, Steven	2.0	A
L6683-3	Supervised Essay on Legal Practice	Talley, Eric	1.0	P

Total Registered Points: 14.0

Total Earned Points: 14.0

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6231-1	Corporations	Talley, Eric	4.0	B+
L6655-1	Human Rights Law Review		0.0	CR
L6250-1	Immigration Law	Harbeck, Dorothy	3.0	A
L6781-1	Moot Court Student Editor II	Bernhardt, Sophia	2.0	CR
L8115-6	S. Negotiation Workshop	Yiannibas, Katerina M.	3.0	B+
L6683-1	Supervised Research Paper	Flaherty, Martin	1.0	CR

Total Registered Points: 13.0

Total Earned Points: 13.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6241-1	Evidence	Shechtman, Paul	3.0	A-
L6276-2	Human Rights	Flaherty, Martin	3.0	A-
L6655-1	Human Rights Law Review		0.0	CR
L6675-1	Major Writing Credit	Flaherty, Martin	0.0	CR
L6681-1	Moot Court Student Editor I	Bernhardt, Sophia	0.0	CR
L6683-1	Supervised Research Paper	Flaherty, Martin	2.0	CR
L6822-1	Teaching Fellows	Kraus, Jody	4.0	CR
L6674-1	Workshop in Briefcraft [Minor Writing Credit - Earned]	Bernhardt, Sophia	2.0	CR

Total Registered Points: 14.0

Total Earned Points: 14.0

Spring 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6133-2	Constitutional Law	Hamburger, Philip	4.0	B+
L6108-2	Criminal Law	Harcourt, Bernard E.	3.0	B+
L6679-1	Foundation Year Moot Court	Strauss, Ilene	0.0	CR
L6130-4	Legal Methods II: Social Justice Advocacy	Franke, Katherine M.	1.0	CR
L6121-13	Legal Practice Workshop II	Lebovits, Gerald	1.0	P
L6169-2	Legislation and Regulation	Johnson, Olatunde C.A.	4.0	B+
L6116-1	Property	Scott, Elizabeth	4.0	B+

Total Registered Points: 17.0

Total Earned Points: 17.0

Fall 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-2	Civil Procedure	Effron, Robin	4.0	A
L6105-1	Contracts	Kraus, Jody	4.0	A+
L6113-2	Legal Methods	Strauss, Peter L.	1.0	CR
L6115-13	Legal Practice Workshop I	Lebovits, Gerald; Newman, Mariana	2.0	P
L6118-5	Torts	Huang, Bert	4.0	A-

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 88.0

Total Earned JD Program Points: 88.0

Best In Class Awards

Semester	Course ID	Course Name
Fall 2020	L6105-1	Contracts

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2022-23	Harlan Fiske Stone	3L
2021-22	Harlan Fiske Stone	2L
2020-21	Harlan Fiske Stone	1L

Pro Bono Work

Type	Hours
Mandatory	40.0
Voluntary	85.0

Columbia Law School

Columbia Law School
Legal Writing & Moot Court Programs

externships@law.columbia.edu
435 West 116th Street
New York, NY 10027

May 19, 2023

Riti Singh
Lecturer in Law
Columbia Law School

To Whom it May Concern,

My name is Riti Singh and I am an attorney in the Appeals Unit in the Juvenile Rights Practice of the Legal Aid Society in New York City. In addition to my work with the Legal Aid Society, since 2021 I have been teaching Legal Practice Workshop (LPW), Columbia Law School's legal research and writing class for first-year law students. As part of her role as a Foundational Moot Court Student Editor, Karen Wang served as my teaching assistant in the spring of 2022. Based on her shrewd legal research and writing skills, patient and collaborative nature, and demonstrated passion for using her legal training to serve her community, it is my pleasure to wholeheartedly recommend Karen for a judicial clerkship.

Karen was one of two teaching assistants who worked with me in a class of about twelve first-year law students; accordingly, I had ample opportunity to work closely with her over the course of the semester. I observed her lead small group sections, offer detailed verbal and written feedback to students, and talk struggling students through complex legal issues. I met with Karen and her fellow TA every week outside of class to discuss students' progress. Karen was transparent about what she needed to succeed in her role as a TA, and consistently offered me valuable feedback about what she observed as common obstacles for students in the class. In this way, she was a true collaborator and I am thankful for her insight. Under her guidance, a student in our LPW class received the Robert Stephen Haft Moot Court Prize, which is awarded to the first-year student at Columbia Law School who submits the best brief in Foundational Moot Court.

Before serving as my TA in the spring of 2022, Karen spent the fall of 2021 helping develop the legal problem that our students ultimately briefed. The problem involved a heated podcast discussion on vaccines and represented a thoughtful, modern and plausible application of students' developing legal skills that had them engaged from the outset. Karen's portion of the legal problem examined whether a podcaster could properly bring a §1983 claim against her previous employer, a podcast company, since the podcast company received some support from the state. As part of her role in crafting the legal problem, Karen helped develop motions and exhibits from both parties, as well as an exhaustive bench memo that served as a critical resource for the panel of oral argument judges.

In addition to being a critical thinker, Karen is very personable. She shared a warm comradery with her fellow TA, which further served our students since they collaborated to develop thoughtful lesson plans. It was a joy to chat with Karen before and after classes, as she regularly

had interesting news to share about her classes, her internships, the Columbia Law School community, and her experience as a Canadian national living in New York City. Karen is easy to work with, reflective, and intentional about developing her skills and the skills of others.
Given my professional background, Karen and I have discussed her desire to use her legal skills to serve the public interest. Specifically, Karen is passionate about serving the Asian-American community and is keenly aware of the specific challenges members of the community face in requesting, accessing and accepting legal assistance. As a fellow Asian-American, I am heartened and inspired to hear Karen's commitment to using her law degree to make access to justice a reality for so many.

A judicial clerkship teaches freshly minted lawyers about the litigation process and exposes them to substantive law from a variety of fields. As a clerk, Karen will further develop the skills she has acquired at Columbia Law School and identify ways she can connect these skills to service. I am confident that she has an exciting career in the law ahead of her and I have no hesitation in recommending Karen for a judicial clerkship. I am happy to provide additional information at your request.

Sincerely,

Riti Singh
rps2163@columbia.edu

Columbia Law School

Human Rights Institute

435 West 116th Street, Box A-2
New York, NY 10027
priyanka.motaparthy@law.columbia.edu

June 14, 2023

Re: Letter of Recommendation for Karen Wang, Judicial Clerkship candidate

To Whom it May Concern,

I am writing to recommend Karen Wang as an excellent candidate for a judicial clerkship. Karen was a student of mine in the Columbia Law School Human Rights Clinic for the 2022-23 academic year. I supervised her as part of a student team working on accountability for human rights abuses in Yemen.

Over the course of the year, Karen showed exceptional growth as a student. She set clear, well-defined goals for her learning, and pursued concrete strategies for meeting these challenges. She developed significantly in her public speaking and presentation skills, strengthened her ability to write with a clear structure and style, and worked diligently on legal research and writing assignments. Her progress was not merely the result of our learning environment, but her clear, active commitment to advancing her learning and skill level on multiple fronts.

During her time as a Human Rights Clinic student, Karen worked with a small team to put together a case file supporting international criminal accountability for an aerial attack in Yemen. In particular, she focused on reviewing large amounts of background and contextual information, and using that information to support the argument that a warring party had demonstrated a clear pattern of abuse over the course of the war. She worked quickly to review a large amount of factual material, including human rights reports, UN factfinding mechanism reports, media reporting, and legal analysis. She also researched and incorporated international legal standards and best practices into her work.

Karen also participated in advocacy meetings with senior U.S. government officials, as part of her clinic experience. She devoted ample time to research and preparation for these meetings, and displayed a strong sense of professionalism in her approach.

Overall, Karen is a strong writer, a diligent researcher, and someone who pursues new tasks and challenges with enthusiasm. She has proven herself a collegial and warm team member who does not hesitate to jump in and take on new tasks. Most importantly, she does not shy away from a challenge, whether it is the task of taking on a large new research project, or meeting her own professional goals. Instead, she has proven herself exceptionally capable of identifying clear, concrete strategies for moving forward in these areas, and delivering high-quality work for both her oral and written coursework.

Karen immigrated to Canada at the age of five, and has shown tremendous resilience and clear dedication to human rights and social justice issues. She has clearly explained to me how a clerkship will support her future career goals, by further strengthening her legal research and writing skills, supporting her develop-

ment as a litigator, and deepening her understanding of the practice of law. Her long-term goal is to support the Asian-American community through her legal work, and she has already taken steps in this direction by volunteering with legal services organizations while in law school.

I strongly recommend Karen as a judicial clerkship candidate. Please let me know if I can provide any further information in support of her application.

Sincerely,

Priyanka Motaparthy

Director, Project on Armed Conflict, Counterterrrorism, and Human Rights, and Project Supervisor, Columbia Law School Human Rights Clinic

June 14, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

Karen Wang was a student in a seminar I taught last fall at Columbia Law School entitled “Current Issues in Civil Liberties and Civil Rights.” She received an A in the course. Based on her performance and my experience working with numerous law students and young lawyers throughout my legal career, I am happy to offer my strong support for Karen’s clerkship application.

Until December 2016, I was the National Legal Director of the ACLU, a position I held for more than two decades. While at the ACLU, I supervised a staff of nearly 100 lawyers and participated in numerous hiring decisions, including hiring for ACLU fellowships available to recent law school graduates. I have also taught for 30 years at various law schools including, most recently, NYU, Columbia, and Stanford. Following my own graduation from law school, I had the opportunity to clerk for Judge J. Edward Lumbard of the United States Court of Appeals for the Second Circuit, which gave me a keen understanding of both the demands of the job and the skills necessary to fulfill them. I am confident that Karen would be an excellent law clerk if given the chance.

Every student in my seminar is required to submit a substantial research paper at the end of the term on a topic of his or her choice. Karen’s paper addressed the spate of recent state laws restricting or banning the teaching of certain “divisive concepts” involving race in the public schools, mischaracterized as critical race theory. She began by describing the practical impact such laws have on both teachers and students. Specifically, she cited the experience of teachers who had either been chilled from teaching such classic texts as *To Kill a Mockingbird* by Harper Lee for fear of violating the law or been fired from their jobs for talking in school about systemic racism. She also referenced academic research demonstrating that the absence of meaningful discussions about race can affect educational outcomes for all students, but especially so for students of color.

The first round of lawsuits challenging such laws have rested primarily on vagueness grounds. Karen acknowledged those cases but chose to focus her paper instead on whether such laws violate substantive First Amendment law. It is a complicated analytic question and, to her credit, Karen’s paper directly confronted those complexities. Building on the Supreme Court’s decisions in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and Bd. of *Education v. Pico*, 457 U.S. 853 (1982), Karen noted that school are constrained by the First Amendment, like all other government officials. Unlike other government officials, however, school officials are allowed to make content-based decisions in constructing the curriculum. Indeed, they are inescapable. Accordingly, strict scrutiny typically does not apply to curricular decisions. Nonetheless, Karen argued, even curricular decisions cannot be motivated by a desire to suppress unpopular ideas; they must instead be supported by a legitimate pedagogical justification.

There are at least two obvious responses to this line of argument, and Karen recognized and responded to both. First, neither Tinker nor Pico involved curricular decisions. The issue in *Tinker* was whether students could be disciplined for wearing a black armband in silent protest of the Vietnam War. *Pico* concerned the removal of books from a school library. And both cases specifically noted that school officials are generally empowered to decide what is taught in the classroom. Karen’s rebuttal rested on two lower court decisions that reached the question that *Tinker* and *Pico* reserved and concluded that the curricular authority of school officials is broad, but not unlimited.

Second, there is considerable case law holding that secondary school teachers do not have the same academic freedom rights as university faculty. Again, Karen acknowledged and addressed that potential obstacle to her thesis by distinguishing between content and viewpoint discrimination and arguing that anti-CRT legislation was an example of the latter, which was not permitted even at the secondary school level without a reasonable educational explanation.

Karen is a clear writer and a careful researcher, two qualities that I regard as indispensable for anyone seeking a judicial clerkship. Throughout her paper, she also demonstrated a nuanced understanding of legal doctrine and a mature understanding that the most effective legal arguments do not attempt to disguise their difficulties. While Karen is a quiet person and did not participate in class as frequently as some others, the contributions she made were thoughtful and on point.

Outside of class, Karen has pursued a variety of public interest activites. She has worked on behalf of battered women with Sanctuary for Families, and on behalf of recent immigrants with the International Refugee Assistance Project. Karen herself migrated to Canada with her family at the age of five, not speaking any English. She is committed to using her law degree to serve the Asian-American community and is pursuing a judicial clerkship to better prepare herself for that career path.

Please do not hesitate to contact me if I can be of any further assistance. I can be reached at sshapi@law.columbia.edu.

Respectfully,

Steven R. Shapiro

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KAREN WANG
Columbia Law School J.D. '23
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CLERKSHIP APPLICATION WRITING SAMPLE

This writing sample was originally written as a paper for my civil rights and liberties seminar with Professor Steven Shapiro. Students in the class were asked to write a paper about a current issue in the civil rights field. I chose to write about the discourse around critical race theory and the various laws that have been enacted to ban this topic from classrooms. One of my main interests in law school has been first amendment issues, with a particular focus on digital rights. This has been something I've explored through research with Professor Olatunde Johnson, participation in the human rights clinic, and writing this paper. This writing sample has not been edited by anyone other than myself.

Don't Say White Privilege: First Amendment Challenges to Critical Race Theory Bans

Karen Wang

"Compulsory unification of opinion achieves only the unanimity of the graveyard.... If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."

- *Justice Robert H. Jackson*

I. Introduction

In the spring of 2020, James Whitfield became the first African American principal at Colleyville Heritage High School, located in a predominantly white suburb of Texas.[1] A year and a half later, and just weeks after Texas Governor Greg Abbot signed a law banning critical race theory in K-12 classrooms, Whitfield was accused of promoting the banned concept at his school.[2] He denied the charge, but the board put him on paid administrative leave and voted not to renew his contract in 2023.[3] James Whitfield is just one of the educators and students impacted by the recent anti-CRT movement that has stormed the country. Earlier in the summer of 2020, former principal Whitfield had written an email to friends and colleagues after the death of George Floyd about "systemic racism" and what could be done to stop it.[4] What began as an innocuous action which received nothing but positive responses from people in the community was twisted into something sinister as anti-CRT bills began sprouting up across multiple states.

Anti-CRT legislation have sought to ban the teaching of "divisive concepts" linked to critical race theory in K-12 public schools, post-secondary schools, and workplaces. Since January 2021, 42 states have introduced bills or taken other steps that would restrict how teachers can discuss racism and sexism.[5]

[1] Scott Neuman, *The Culture Wars are Pushing Some Teachers to Leave the Classroom*, NPR (Nov. 13, 2022, 7:00 AM), https://www.npr.org/2022/11/13/1131872280/teacher-shortage-culture-wars-critical-race-theory.
[2] *Id*.
[3] *Id*.
[4] *Id*.
[5] Sarah Schwartz, *Map: Where Critical Race Theory is Under Attack*, EDUCATIONWEEK (Jun. 11, 2021), https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06.

Seventeen states, including Oklahoma, Florida, and Texas, currently have legislation in place that bans the teaching of concepts linked to critical race theory.[6] Dozens more have proposed bills or have legislation moving through the pipelines.[7] Conservative rhetoric has characterized critical race theory as race and sex scapegoating and says it promotes the notion that white people are inherently racist and should feel shame or guilt. Critics of critical race theory believe it shouldn't be taught in schools because it "demoralizes K-12 students, polarizes higher ed students, guilts on working Americans, and condones cancel culture. [CRT] stokes grievances with the purpose of creating victims."[8] Ron DeSantis, the republican Governor of Florida, introduced the Stop W.O.K.E. Act, Florida's version of anti-CRT legislation, by saying "in Florida we are taking a stand against the state-sanctioned racism that is critical race theory…. We won't allow Florida tax dollars to be spent teaching kids to hate our country or to hate each other."[9]

Prominent scholars of critical race theory have condemned this characterization, arguing that nowhere in the literature on critical race theory does it say that one race is inherently better than another or that people should feel bad simply because of their race or sex.[10] Rather, critical race theory "argues that historical patterns of racism are ingrained in law and other modern institutions, and that the legacies of slavery, segregation, and Jim Crow still create an uneven playing field for Black people and other people of color."[11] No one believes that kids should be taught to hate America or to hate each other, but that's become the fear of many parents and communities swayed by anti-CRT rhetoric.

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[6] *Id*.
[7] *Id*.
[8] *Combatting Critical Race Theory*, THE HERITAGE FOUNDATION (May 21, 2021), https://www.heritage.org/civil-society/commentary/combatting-critical-race-theory.
[9] News Release, Ron DeSantis, Governor of Florida, *Governor DeSantis Announces Legislative Proposal to Stop W.O.K.E. Activism and Critical Race Theory in Schools and Corporations* (Dec. 15, 2021), https://www.flgov.com/2021 /12/15/governor-desantis-announces-legislative-proposal-to-stop-w-o-k-e-activism-and-critical-race-theory-in-schools-and-corporations/.
[10] Consider This, *How Critical Race Theory Went From Harvard Law to Fox News*, NPR, at 17:03 (Jul. 6, 2021), https://www.npr.org/2021/07/02/1012696188/how-critical-race-theory-went-from-harvard-law-to-fox-news.
[11] Lauren Jackson, *What is Critical Race Theory?*, N.Y. TIMES (Aug. 18, 2021), https://www.nytimes.com/2021/07/09/podcasts/the-daily-newsletter-critical-race-theory.html.

The worry of those opposed to the new slew of anti-CRT legislation is that the breadth of the law will prevent important things like Black history from being included in curriculums and prevent the analysis or acknowledgment of racial, gender, ethnic, and socioeconomic conflict in relation to various subjects like history, art, and literature. There has already been documentation of teachers self-censoring in fear of repercussions.[12] Mary McIntosh, a high school teacher in Memphis, didn't teach civil rights lawyer Bryan Stevenson's memoir *Just Mercy* last year because she was afraid it would run afoul of the "prohibited concepts" in her state's anti-CRT laws.[13] District administrators from Oklahoma, a state that has enacted anti-CRT legislation, have struck texts by Black and female authors from their reading lists, including culturally significant texts like *To Kill a Mockingbird* and *I Know Why the Caged Bird Sings*, long-standing favorites of high school reading lists.[14]

Students, teachers, and non-profit organizations opposed to anti-CRT laws have brought lawsuits in various jurisdictions alleging violations of the First and Fourteenth Amendment.[15] Plaintiffs have generally focused on vagueness as their main argument.[16] The Supreme Court has held that under the Fourteenth Amendment, a law is "void for vagueness if its prohibitions are not clearly defined."[17] This argument seems the most likely to succeed because the "divisive concepts" banned by anti-CRT are extremely broad and not clearly defined. Many educators have stated that they aren't sure what is and isn't allowed in the classroom.[18] Former President Trump's executive order, upon which most state anti-

[12] Olivia B. Waxman, *Anti-'Critical Race Theory' Laws Are Working. Teachers Are Thinking Twice About How They Talk About Race*, TIME (Jun. 30, 2022), https://time.com/6192708/critical-race-theory-teachers-racism/.
[13] *Id*.
[14] Complaint, at 51-61, Black Emergency Response Team v. O'Connor, No. 5:21-cv-01022 (W.D. Okla. Oct. 19, 2021).
[15] *See, e.g.*, Complaint, Black Emergency Response Team v. O'Connor, No. 5:21-cv-01022-G, (W.D. OK., filed Nov. 9, 2021); Complaint, Equality Florida v. DeSantis, No. 4:22-cv-00134, (N.D. Fl., filed Mar. 31, 2022).
[16] *Id*.
[17] Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).
[18] *See* Theodore Johnson, et al., *How Anti-Critical Race Theory Bills are Taking Aim at Teachers*, FIVETHIRTYEIGHT (May 9, 2022), https://fivethirtyeight.com/features/how-anti-critical-race-theory-bills-are-taking-aim-at-teachers/ ("The law is really, really vague. We asked for clarification from the state, from the union, from school lawyers. The universal response is no one's really sure.").

CRT legislation is based, was struck down by a federal court on vagueness grounds.[19] Given that precedent, it's likely that the ongoing lawsuits will be decided on vagueness grounds.

However, when asked whether you can stop students from learning about a certain topic or historical event, the gut instinct of most people will be to say no because that's a freedom that's protected under the First Amendment. A reality where you can restrict academic freedom in such a way seems almost frighteningly Orwellian. This paper will examine that instinct and determine whether it holds true under current law. There is a possibility that courts will find that anti-CRT bills are not unconstitutionally vague. Or, in a more far-fetched scenario, legislators could choose to re-write legislation to be clearer. In such a situation, could anti-CRT bills be thrown out on First Amendment grounds? Examination of current case law tells us that there are definitely strong First Amendment claims to be made. However, the key issue will be whether these protections still hold true in the unique environment of the school, where the government has more control over speech and certain First Amendment rights are abridged.

This paper will examine these questions in the context of existing case law precedent and argue that anti-CRT laws cross the line and violate sacrosanct First Amendment rights. Section II will begin by defining the problem through an examination of what anti-CRT laws say and the potential future harms that exist. Section III will analyze two first amendment rights which are infringed upon by anti-CRT bills: (1) the students' right to receive information, and (2) the teachers' right of free speech and academic freedom.

II. Defining the Problem: Critical Race Theory and Anti-CRT Bills

a. Anti-CRT Bills: The Invention of the Conflict Over Critical Race Theory

In the summer of 2020, the death of George Floyd prompted massive Black Lives Matter protests across the nation and stirred up important conversations about race. Following the widespread protests, many corporations and government entities started conducting diversity and inclusion trainings in earnest.

[19] Santa Cruz Lesbian and Gay Community Center v. Trump, 508 F.Supp.3d 521 (N.D. Cal. 2020).

This caught the attention of Christopher Rufo, a senior fellow at a conservative think tank called the Manhattan Institute.[20] In July 2020, Rufo received a tip from a municipal employee in Seattle who said the city had started doing workplace trainings that were teaching white people to hate themselves.[21] Rufo recognized this as a political opportunity and wrote an article accusing the city of Seattle of "explicitly endorsing principles of segregationism, group-based guilt, and race essentialism—ugly concepts that should have been left behind a century ago."[22] Rufo started calling the phenomenon "critical race theory" and called on former President Trump to issue an executive order to outlaw it.[23]

Former President Trump did exactly that and signed an executive order directing federal agencies to end racial sensitivity training that addressed white privilege or "critical race theory," as defined by Rufo.[24] The stated purpose of the executive order was to end the promotion of "race or sex stereotyping or scapegoating" and it banned the following "divisive concepts":[25]

1. One race or sex is inherently superior to another race or sex.
2. The United States is fundamentally racist or sexist.
3. An individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously.
4. An individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex.
5. Members of one race or sex cannot and should not attempt to treat others without respect to race or sex.
6. An individual's moral character is necessarily determined by his or her race or sex.

[20] Consider This, *supra* note 10.
[21] Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict Over Critical Race Theory*, THE NEW YORKER (Jun. 18, 2021), https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory.
[22] *Id*.
[23] Consider This, *supra* note 8.
[24] *Id*.
[25] Exec. Order No. 13950, 85 Fed. Reg. 60683 (Sep. 22, 2020).

7. An individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex.
8. That any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex.
9. Meritocracy or traits such as a hard work ethic are racist or sexist or were created by a particular race to oppress another race.

This executive order was quickly struck down by a federal district court on vagueness grounds.[26] However, former-President Trump's executive order inspired a whole slew of state-level legislation banning the promotion of "divisive concepts" in K-12 public schools, post-secondary schools, and workplace trainings. Most of the proposed state legislation mirrors the language in Trump's executive order and, when read narrowly, a lot of the prohibited "divisive concepts" are not controversial at all. No one wants students to think that one class of people is morally superior to another or that someone should be discriminated against purely because of their identity. Anti-CRT laws are drafted to presumably uphold "non-racist" goals and appear on their face to proclaim their belief in racial and gender equality.[27] However, many of these educational restrictions quickly become problematic when interpreted broadly. If interpreted broadly, these laws could be read to prohibit lessons on oppression, systemic racism, white privilege, and affirmative action, to name a few.

Many state statutes could be read to ban even objective accounts of historical events involving racial conflict.[28] Some states only limit teachers in that they cannot intentionally instruct students that a concept (such as systemic racism) is true, not that it exists and may have motivated historical and contemporary practices.[29] Other state legislation could be read to punish teachers merely for teaching that

[26] Santa Cruz Lesbian and Gay Community Center v. Trump, 508 F.Supp.3d 521 (N.D. Cal. 2020).
[27] *See e.g.*, H.B. 377, 66th Leg., 1st Reg. Sess. (Idaho 2021) (finding that the prohibited tenets "exacerbate and inflame divisions on the basis of sex, race, ethnicity, religion, color").
[28] Joshua Gutzmann, *Fighting Orthodoxy: Challenging Critical Race Theory Bans and Supporting Critical Thinking in Schools*, 106 MINN. L. REV. HEADNOTES 333, 336 (2022).
[29] *See e.g.*, IDAHO CODE § 33-138(3)(a) (2021); N.H. REV. STAT. ANN. § 193:40 (2021).

a concept like systemic racism exists. For example, South Carolina's anti-CRT law prohibits schools and teachers "to approve for use, make use of, or carry out standards, curricula, lesson plans, textbooks, instructional materials, or instructional practices that serve to inculcate any of the following [divisive] concepts."[30] The Oklahoma statute bans "requir[ing]" prohibited concepts "or mak[ing them] part of a course."[31] Many other states use similarly overbroad and confusing language.[32] This legislation could easily result in the erasure from public school curricula of any historical events or social science concepts that acknowledge discrimination and racial/gender conflict.

b. Critical Race Theory: The Original Version

Critical race theory began as a legal framework developed at Harvard Law School in the 1960s-70s.[33] It posits that racism isn't just a product of individual bias, but that it is embedded in legal systems and policies.[34] The theory's foundational figures outlined six defining elements of critical race theory:[35]

1. CRT recognizes that racism is endemic to American life.
2. CRT expresses skepticism toward dominant legal claims of neutrality, objectivity, colour-blindness, and meritocracy.
3. CRT challenges ahistoricism and insights on a contextual/historical analysis of the law.
4. CRT insists on recognition of the experiential knowledge of people of colour.
5. CRT is interdisciplinary and eclectic.
6. CRT works toward the end of eliminating racial oppression as a part of the broader goal of ending all forms of oppression.

[30] H. 4100, 2021 Gen. Assemb., 124th Sess. § 1.105 (S.C. 2021).
[31] OKLA. STAT. tit. 70, § 24-157(B)(1) (2021).
[32] *See e.g.*, TEX. EDUC. CODE ANN. § 28.0022(a) (4)(A) (West 2021) ("require or make part of a course"); ARIZ. REV. STAT. § 15-717.02(B) (2021) ("allow[ing] instruction in [the listed ideas] or mak[ing them] part of a course").
[33] NPR, *supra* note 10.
[34] *Id*.
[35] Janel George, *A Lesson on Critical Race Theory*, A.B.A. (Jan. 11, 2021), https://www.americanbar.org/groups/crsj/publications/humanrightsmagazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/.

A quick comparison between the above tenets and the "divisive concepts" described in the majority of anti-CRT legislation shows that there is a huge discrepancy between the two. Gloria Ladson-Billings, an American pedagogical theorist known for her work on critical race theory, said that Rufo and former President Trump have crafted an entirely incorrect conceptualization of critical race theory.[36] She describes critical race theory as a series of theoretical propositions that suggests race and racism are normal and not aberrate in American life.[37] Two of the foremost proponents of CRT, Richard Delgado and Jean Stefancic, listed the following as some of the core tenets of CRT: (1) that racism is ordinary and every day; (2) white people benefit from racism and thus have little incentive to eliminate it; (3) race is a social construction; and (4) white people are unlikely to understand or communicate racism in the same way that it is experienced by people of color.[38] None of the prominent literature on critical race theory has suggested the idea that an individual should feel guilt on account of his or her race or that an individual is inherently racist on account of his or her race. Moreover, there is no documentation of critical race theory, as originally conceived, being taught in K-12 classrooms. However, conservative politicians have been pushing again and again this erroneous description of critical race theory and how it is "teaching kids to hate our country or to hate each other."[39] The significant mismatch between what critical race theory actually is and how conservative politicians have been talking about it suggests dishonesty on the part of legislators about both the purpose of the statutes and the true motivations behind them.

c. Harmful Implications of Anti-CRT Legislation

Although anti-CRT laws appear benign on the surface, they carry dangerous implications for the First Amendment rights of students and teachers. There has been ample documentation of teachers being fired or quitting due to conflicts with the new anti-CRT laws.[40] Matt Hawn, a high school teacher in

[36] NPR, *supra* note 10.
[37] *Id*.
[38] RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 7-10 (3d ed. 2013).
[39] DeSantis, *supra* note 9.
[40] Shani Saxon, *Critical Race Theory Battles are Driving Black Educators Out of Their Jobs*, COLORLINES (July 13, 2021, 10:31 AM), https://www.colorline.com/articles/critical-race-theory-battles-are-driving-black-educators-out-their-jobs.

Tennessee, was issued an official reprimand after he discussed recent events surrounding Kyle Rittenhouse, a white teenager accused of killing two Black Lives Matter protestors, in the contemporary issues class he was teaching.[41] He got in even more trouble with authorities after he assigned an Atlantic article titled *The First White President,* arguing that former-President Trump was elected on "the strength of white grievances."[42] Finally, after showing students a poem performance entitled *White Privilege,* Mr. Hawn was fired.[43] Kim Morrison, a high school English teacher in Missouri, was fired for similar reasons after assigning a worksheet titled "How Racially Privileged Are You?" as prep material for the school-approved book "Dear Martin."[44] Though both teachers only discussed topics which are tangentially related to the prohibited "divisive concepts" linked to critical race theory, they ended up losing their jobs.

Multiple educators have also reportedly been pressured by their communities to quit due to CRT conflicts. Rydell Harrison, the first Black school superintendent of Southwestern Connecticut, resigned after parents started to complain about his newly implemented diversity efforts, characterizing him as an "activist" who is pushing his "agenda" on the kids.[45] Educators who haven't been fired or quit have reported feeling the need to self-censor and change lesson plans to avoid potential violations of the law.[46] In New Hampshire, Jen Given, a high school history teacher, said she's stopped teaching students about racial disparities in economics by tying relative lack of Black wealth to Jim Crow laws and redlining.[47] Givens said "we started avoiding modern parallels in order to avoid any question coming up that we were,

[41] Emma Green, *He Taught a Ta-Nehisi Coates Essay. Then He Was Fired*, THE ATLANTIC (Aug. 17, 2021), https://www.theatlantic.com/politics/archive/2021 /08/matt-hawn-tennessee-teacher-fired-white-privilege/619770/.
[42] *Id*.
[43] *Id*.
[44] Claudette Riley, *Southwest Missouri High School Teacher Accused of Using Critical Race Theory Loses Job*, SPRINGFIELD NEWS-LEADER (Apr. 7, 2022), https://www.news-leader.com/story/news/education/2022/04/07/greenfield-missouri-teacher-kim-morrison-accused-teaching-critical-race-theory-crt-loses-job/7264924001/.
[45] Saxon, *supra* note 41.
[46] Adrian Florido, *Teachers Say Laws Banning Critical Race Theory are Putting a Chill on Their Lessons*, NPR (May 28, 2021), https://www.npr.org/2021/05/28/1000537206/teachers-laws-banning-critical-race-theory-are-leading-to-self-censorship.
[47] Laura Meckler & Hannah Natanson, *New Critical Race Theory Laws Have Teachers Scared, Confused and Self-Censoring*, THE WASHINGTON POST (Feb. 14, 2022), https://www.washingtonpost.com/education/2022/02/14/critical-race-theory-teachers-fear-laws/.

by including this information, somehow suggesting one group is better than the other."[48] It's clear that anti-CRT laws have changed how teachers act and feel in their classrooms.

Students in states with enacted anti-CRT laws have also suffered from two distinct harms: (1) harm to a culturally sustaining curriculum, and (2) harm to students' critical reasoning skills.[49] Damage to the curriculum stems from the various ways anti-CRT laws have restricted what teachers are able to teach in classrooms. A commonly accepted best practice among educators is to use culturally sustaining pedagogy as a way to combat racial disparities in educational outcomes.[50] This involves acknowledging, studying, and analyzing cultural differences. Gloria Ladson-Billings, a professor of education who coined the term "culturally sustaining pedagogy," wrote that to achieve better student outcomes, "students must develop a broader sociopolitical consciousness that allows them to critique the cultural norms, values, mores, and institutions that produce and maintain social inequities."[51] Numerous studies have shown that a culturally sustaining curriculum is vital for motivating students and that it has tremendous impacts on student outcomes.[52] However, maintaining such a curriculum is difficult when anti-CRT laws have caused teachers to change lesson plans to avoid anything with potential links to buzzwords like "systemic racism." Anti-CRT bills have essentially mandated denial in many states by limiting what children can learn about racism.[53] Administrators in Oklahoma even sent a slide presentation to staff members saying that teachers should avoid using terms like "diversity" and "white privilege" during classroom discussions.[54] This not only negatively impacts all students' quality of education, but also disparately

[48] *Id*.
[49] Gutzmann, *supra* note 29, at 354-356.
[50] *See generally*, Gloria Ladson-Billings, *Like Lightning in a Bottle: Attempting to Capture the Pedagogical Excellence of Successful Teachers of Black Students*, 3 INT' J. QUALITATIVE STUD. EDUC. 335 (1990); Gloria Ladson-Billings, *Toward a Theory of Culturally Relevant Pedagogy*, 32 AM. EDUC. RSCH. J. 465 (1995).
[51] Gloria Ladson-Billings, *But That's Just Good Teaching! The Case for Culturally Relevant Pedagogy*, 34 THEORY INTO PRAC. 159, 162 (1995).
[52] Tyrone C. Howard & Andrea C. Rodriguez-Minkoff, *Culturally Relevant Pedagogy 20 Years Later: Progress or Pontificating? What Have We Learned, and Where Do We Go?*, TCHRS. COLL. REC., Jan. 1, 2017, at 11-15.
[53] Zoe Masters, *After Denial: Imagining With Education Justice Movements*, 25 U. PA. J. L. & SOC. CHANGE 219, 221 (2022).
[54] Meckler & Natanson, *supra* note 48.

impacts students of color, a group which has been shown to particularly benefit from culturally sustaining pedagogy.

Anti-CRT laws have also threatened significant harm to students' opportunity to learn the critical reasoning skills necessary to thrive in a diverse society like America.[55] By restricting what students can learn about racism, white privilege, and other prohibited "divisive concepts," schools are unable to teach students how to critically analyze important historical events. For example, Jen Givens' high school class lost an important opportunity to critically analyze why racial disparities in economics exist because Givens doesn't want to risk running afoul of anti-CRT laws.[56] Anti-CRT legislation has impacted how various subjects including history, art, literature, and social sciences are taught by limiting how teachers are able to discuss and analyze racial and gender conflict with students. These harms are severe and may rise to the level of constitutional violations under the First Amendment.

III. First Amendment Arguments Against Anti-CRT Legislation

a. Student's Right to Receive Information

The First Amendment not only guarantees individual self-expression, but also affords "the public access to discussion, debate, and the dissemination of information and ideas."[57] The right to receive information unavoidably follows from the sender's First Amendment right to send information; accordingly, the Supreme Court has recognized that in a variety of contexts, "the Constitution protects the right to receive information and ideas."[58] The school environment presents a unique context for First Amendment law because the state has broad discretion over prescribing what will be taught and how the school is managed. Moreover, school boards have a duty to inculcate community values and their decisions as to educational content may properly reflect local community views and values.[59] It's difficult

[55] Gutzmann, *supra* note 29, at 356.
[56] Meckler & Natanson, *supra* note 48.
[57] First National Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978).
[58] Stanley v. Georgia, 394 U.S. 557, 564 (1969).
[59] Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico, 457 U.S. 853, 869 (1982).

to draw a clear line between permissible curriculum decisions based on community values and impermissible curriculum decisions that violate students' right to receive information.

However, prior case law has recognized that there are constitutional limits on the power of the state to control the classroom.[60] In *Tinker v. Des Moines*, the Supreme Court held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[61] Later, in *Board of Education, Island Trees v. Pico*, the Supreme Court officially recognized students' right to receive information as existing in the school context.[62] The court established that under the First Amendment, school boards cannot intentionally deprive students access to ideas with which the school disagrees unless they have a legitimate, non-discriminatory, pedagogical reason.[63] Students have a right to learn and "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge."[64]

The *Island Trees* case was brought by a group of students who challenged the school board's decision to remove certain books they found objectionable from the school library.[65] Members of the board had obtained a list of objectionable books from a conference they attended sponsored by a politically conservative organization.[66] They discovered ten of the books on the list were contained in their school district's libraries and quickly directed the books be removed and delivered to the board for review.[67] The board appointed a committee made up of parents and teachers to review the books and the committee found that of the ten, five were fine and recommended returning those five to library shelves.[68] The board, without explanation, decided to reject the committee's recommendations and permanently

[60] *See* Meyer v. Nebraska, 262 U.S. 390 (1923) (striking down a state law that forbade the teaching of modern foreign languages in public and private schools); Epperson v. Arkansas, 393 U.S. 97 (1968) (declaring unconstitutional a sate law that prohibited the teaching of the Darwinian theory of evolution).
[61] Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969).
[62] Island Trees, 457 U.S. at 853.
[63] *Id*. at 853.
[64] Griswold v. Connecticut, 381 U.S. 479, 482 (1965).
[65] Island Trees, 457 U.S. at 853.
[66] *Id*.
[67] *Id*.
[68] *Id*.

removed nine of the ten books, characterizing them as "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy."[69]

The Supreme Court found for the plaintiffs and held that under the First Amendment, the school board may not remove books from library shelves "simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'"[70] Although schools are a unique environment for First Amendment rights in that the state generally has broad discretion to manage the school, the court held that "such discretion must be exercised in a manner that comports with the transcendent imperatives of the First Amendment."[71] The school board cannot exercise their significant discretion in a partisan or political manner and the motivations behind their actions will determine whether there has been a First Amendment violation. In other words, the court held that schools cannot remove books simply because they dislike the ideas contained in them; the board must have some other legitimate, pedagogical reason.

There are some difficulties in applying *Island Trees* to anti-CRT legislation. The major issue is that *Island Trees* concerned library books whereas anti-CRT legislation applies to curricula. The majority opinion in *Island Trees* emphasized the fact that libraries are the "regime of voluntary inquiry" and the case does not concern books that students are required to read.[72] Anti-CRT laws, on the other hand, apply to the compulsory environment of the classroom, where teachers' speech is arguably forced on students who may not want to be in that position. This creates additional problems which the majority in *Island Trees* likely did not want to deal with. If read narrowly, the rule articulated in *Island Trees* can be interpreted to apply only to non-compulsory materials, not to curricula.

[69] *Id*.
[70] *Id*. at 872, quoting West Virginia Bd. of Educ. V. Barnette, 319 U.S. 624, 642 (1943).
[71] *Id*. at 853.
[72] *Id*. at 854.

However, several circuit courts have found that *Island Trees* should be read broadly and extended to the context of curricula.[73] The Eighth Circuit in *Pratt v. Independent School Board* applied the Supreme Court's ruling in *Island Trees* to hold that a school board's removal of a short film from the curriculum violated students' First Amendment rights because of the reasons behind its removal.[74] The district court had determined that the school board removed the film not because it contained scenes of violence, but rather because members of the board considered the films' ideological and religious themes to be offensive.[75] The eighth circuit held that "[n]otwithstanding the power and discretion accorded them, school boards do not have an absolute right to remove materials from the curriculum."[76] To avoid a finding of unconstitutionality, the board must establish a legitimate, pedagogical reason for interfering with the students' right to receive information.[77]

More recently, a district court in Arizona similarly found that students' right to receive information applies in the context of school curriculum design.[78] In *Gonzalez v. Douglas*, students and teachers successfully challenged an Arizona law that prohibited educators from teaching classes "designed primarily for pupils of a particular ethnic group."[79] This legislation was enacted after a Mexican American Studies class in Tucson, Arizona caught the attention of two state officials who later sought to instate a statewide ban on ethnic studies.[80] The court cited *Pico* in holding that students had a right to receive information and that "right is infringed if the state 'remove[s] materials otherwise available in a local classroom unless [that] action [is] reasonably related to legitimate pedagogical

[73] *See e.g.*, Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 631 (2d Cir. 2005); Settle v. Dickson Cty. Sch. Bd., 53 F.3d 152, 155 (6th Cir. 1995); Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1027 n.5 (9th Cir. 1998); Axson-Flynn v. Johnson, 356 F.3d 1277, 1292, 1292 (10th Cir. 2004).
[74] Pratt v. Indep. Sch. Dist. No. 831, 670 F.2d 771, 773 (1982).
[75] *Id.*
[76] *Id.* at 775.
[77] *Id.* at 777.
[78] Gonzalez v. Douglas, 269 F. Supp. 3d 948, 972 (D. Ariz. 2017).
[79] *Id.* at 957.
[80] Masters, *supra* note 54 at 232.

concerns.'"[81] The court found that the law violated students' limited First Amendment right to receive information because it was motivated by racial animus rather than a legitimate pedagogical purpose.[82]

The holdings in *Gonzalez* and *Pratt*, combined with the rule articulated in *Island Trees*, strongly supports a finding that anti-CRT laws violate the right to receive information so long as plaintiffs are able to show that the laws are driven by political purposes and not legitimate, pedagogical interests. The intent requirement may present an obstacle for an anti-CRT law challenge because *Gonzalez* turned on lawmakers' blatant racial animus against Mexican Americans whereas anti-CRT laws, at least on their face, are drafted to uphold "non-racist" goals. However, this obstacle may be overcome by reference to the legislative history and political rhetoric behind anti-CRT legislation.

Although anti-CRT legislation generally proclaims the goal of enforcing racial and gender equality, analysis of the context in which CRT rhetoric arose and the speech of legislators shows that this is a deceptive mask for legislators' true intent. Christopher Rufo, the person who started the CRT conflict back in 2020, described on Twitter a plan to "driv[e] up negative perceptions" by "recodify[ing]" the various ideas embodied by antiracist education and rebranding them as a "toxic … brand category" that he labeled CRT.[83] Proponents of CRT are hard-pressed to point to real instances where a child in a school setting was actually made to feel guilty or inherently racist because of their race or gender.[84] Speech by the state legislators behind Oklahoma's anti-CRT bill revealed that the bill was driven by racial and partisan interests, not legitimate pedagogical ones.[85] In a press release, Representative West disparaged critical race theory and described it as "teach[ing] that most laws and systems in America are historically

[81] Gonzalez, 269 F. Supp. 3d at 972.
[82] *Id*. at 972-973.
[83] Christopher Rufo (@realchrisrufo), Twitter (Mar. 15, 2021, 3:17 PM), https://twitter.com/realchrisrufo/status/1371541044592996352.
[84] *See* Lauren Jackson, *What is Critical Race Theory*, N.Y. TIMES (Jul. 9, 2021), https://www.nytimes.com/2021/07/09/podcasts/the-daily-newsletter-critical-race-theory.html ("You'd have to look long and hard to find any K-12 classroom where the term 'critical race theory' comes up. … While the anti-C.R.T. activist Christopher F. Rufo lists 11 examples of 'critical race theory in education,' most are examples of schools offering teachers diversity training.")
[85] Complaint, at 51, Black Emergency Response Team v. O'Connor, No. 5:21-cv-01022 (W.D. Okla. Oct. 19, 2021).

rooted in the racist oppression of black people and other marginalized groups. It promotes the theory of implicit bias and inherent racism due to one's skin color."[86] In a house session, Representative Humphrey vocalized his strong support for the bill by stating "[p]olice brutality is a lie...Those are the kind of lies that we must end."[87] This kind of speech shows racial animus and partisan interests behind anti-CRT legislation.

Moreover, proponents of anti-CRT do not articulate any legitimate pedagogical objectives aside from shielding students from discomfort or divisiveness.[88] Challengers could argue that divisiveness is not a legitimate, pedagogical interest. The Supreme Court has held that schools need to provide access to potentially divisive ideas in order to "prepare students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members."[89] The court has also held that the state cannot remove "subversives" from teaching roles at universities because "[t]he classroom is peculiarly the 'marketplace of ideas.'"[90]

Even if discomfort and divisiveness are legitimate, pedagogical objectives, they are arguably not enough to overcome students' First Amendment protections. The First Amendment implications are extremely severe if anti-CRT laws are allowed to stand because the banned concepts are so broad and far-reaching. The convenient term "critical race theory" makes it appear as though a singular topic is being banned, but in reality, the legislation has excluded an entire viewpoint and a way of thinking that reaches into all parts of the curriculum including history, social sciences, art, and literature. The breadth of the

[86] *Bill Promoting "Critical Race Theory" Curriculum Passes House*, OKLA. H.R. (Apr. 29, 2021), https://www.okhouse.gov/members/PrintStory.aspx?NewsID=8125.
[87] April 29th House Session at 12:08:20–12:08:38 PM.
[88] *See e.g.*, Stephen Kearse, *GOP Lawmakers Intensify Effort to Ban Critical Race Theory in Schools*, STATELINE, PEW CHARITABLE TRUSTS (June 14, 2021), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/06/14/gop -lawmakers-intensify-effort-to-ban-critical-race-theory-in-schools ("Missouri state Rep. Brian Seitz, a Republican, said in a phone interview that teaching critical race theory in schools would create 'another great divide in America.'").
[89] Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico, 457 U.S. 853, 868 (1982).
[90] Keyishan v. Board of Regents, 385 U.S. 589, 603 (1967).

ban may make courts more hesitant to approve anti-CRT legislation when weighing the state's legitimate pedagogical interests against student's First Amendment rights.

The right to receive information argument against anti-CRT legislation is a strong one. Current case law supports a finding that the state cannot restrict curriculum design in such a way without articulating a legitimate, pedagogical interest. The legislative history and the context in which the conflict over critical race theory arose support a finding that the state did not have a legitimate, pedagogical interest and that anti-CRT legislation is driven by racial and political animus.

b. Teacher's Right of Free Speech and Academic Freedom

Opponents of anti-CRT legislation may also bring a claim arguing that the laws violate teachers' free speech and academic freedom rights under the First Amendment. There is a marked difference between controlling the content of a school's curriculum and controlling what viewpoints a teacher may express about that content once it has been set. The state has broad discretion in making content-based decisions about the curriculum, but they may not have unfettered discretion over what viewpoints a teacher may express regarding that content. Justice Black recognized this distinction in *Epperson v. Arkansas*, writing "[i]t is plain that a state law prohibiting all teaching of human development or biology is constitutionally quite different from a law that compels a teacher to teach as true only one theory of a given doctrine. It would be difficult to make a First Amendment case out of a state law eliminating the subject of higher mathematics, or astronomy, or biology from its curriculum."[91] This distinction between curriculum content and teachers' viewpoints could be the basis of a successful First Amendment challenge to anti-CRT laws.

A recent decision by a district court in Florida, *Pernell v. Fla. Bd. of Governors*, laid out a good framework for thinking about this issue.[92] The case was brought by professors and students challenging

[91] Epperson v. Arkansas, 393 U.S. 97, 111 (1968) (Black, J., concurring in result).
[92] Pernell v. Florida Bd. Of Governors, No. 4:22cv324-MW/MAF, 2022 WL 16985720 (N.D. Fla. Nov. 17, 2022).

Florida's anti-CRT legislation, the "Stop W.O.K.E." Act (redubbed the "Individual Freedom Act"), on First Amendment grounds. The court granted a motion for preliminary injunction and held that the professor-plaintiffs were likely to succeed on the merits of their First Amendment claim.[93] The court made a distinction between speech discrimination based on content and speech discrimination based on viewpoint, holding that the former is allowable in schools but the latter is not.[94] In practice, this appears to mean that the Florida A&M University College of Law may direct Plaintiff Professor LeRoy Pernell to teach a class on criminal procedure, but it cannot stop him from discussing in class how racism is embedded in the criminal justice system.[95] If applied to the primary and secondary school context, this would mean that the school can dictate what subjects get taught and what methods teachers use to teach them, but they cannot stop teachers from using terms like "diversity" and "white privilege" when discussing the school-board approved topics.[96]

An obstacle against a claim based on teachers' free speech rights is the Supreme Court holding in *Garcetti v. Ceballos*. The court held in *Garcetti* that the First Amendment does not shield a government employee's speech and expression made pursuant to their professional duties from employer discipline.[97] However, the majority opinion explicitly declined to decide whether *Garcetti* would apply to issues involving teaching in classrooms, presumably leaving this determination for the lower courts.[98] The court in *Pernell* rejected the defendant's argument that the holding of *Garcetti* applies to professors' in-class speech.[99] The Supreme Court had recognized in *Garcetti* that "expression related to academic scholarship or classroom instruction [arguably] implicates additional constitutional interests that are not fully

[93] Pernell v. Florida Bd. Of Governors, No. 4:22cv324-MW/MAF, 2022 WL 16985720, at *53 (N.D. Fla. Nov. 17, 2022).
[94] *Id.* at *7.
[95] *See id.* at *14 (describing plaintiffs and their claims).
[96] *See* Meckler & Natanson, *supra* note 48 (describing how teachers in Oklahoma were directed by administrators to avoid using the terms "diversity" and "white privilege" in classroom discussions.).
[97] Garcetti v. Ceballos, 547 U.S. 410, 426 (2006)
[98] *Id.* at 425 ("[T]oday's decision may have important ramifications for academic freedom, at least as a constitutional value …. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.").
[99] Pernell v. Florida Bd. Of Governors, No. 4:22cv324-MW/MAF, 2022 WL 16985720, at *9 (N.D. Fla. Nov. 17, 2022).

accounted for by [the] Court's customary employee-speech jurisprudence."[100] If a state is allowed to suppress disfavored viewpoints among educators in academic settings, this would give the state the power to indoctrinate students to its preferred viewpoint and "cast a leaden pall of orthodoxy over" its classrooms.[101] This would be antithetical to the core principles of democracy and "cast us all into the dark."[102]

The problem with applying *Pernell* to all anti-CRT legislation is that the case only deals with post-secondary level educators. Courts have traditionally treated universities differently from K-12 schools.[103] Primary and secondary school environments present additional issues like the fact that younger students may require greater protection and that students for the most part do not get to choose where they attend school and what classes they take. The seventh circuit held in *Mayer v. Monroe* that "the first amendment does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system."[104] However, other circuits have recognized First Amendment protections on classroom discussions at the secondary level. The fifth circuit in *Kingsville v. Cooper* held that a high school teacher's "classroom discussion is protected activity" under the First Amendment.[105] Recently, the fifth circuit affirmed that *Kingsville* is still good law and that "academic freedom is 'a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.'"[106] The circuit split means that there is uncertainty about whether the in-class speech of teachers in primary and

[100] *Id*.
[101] *Id*. at *41.
[102] *Id*. at *52.
[103] *See e.g.*, Evans-Marshall v. Bd. of Educ. of Tipp. City Exempted Vill. Sch. Dist., 624 F.3d 332, 344 (6th Cir. 2010) ("constitutional rules applicable in higher education do not necessarily apply in primary and secondary schools, where students generally do not choose whether or where they will attend school.").
[104] Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 480 (7th Cir. 2007).
[105] Kingsville Indep. Sch. Dist. v. Cooper, 611 F.2d 1109, 1114 (5th Cir. 1980).
[106] Buchanan v. Alexander, 919 F.3d 847, 852 (5th Cir. 2019) (quoting Keyishan v. Board of Regents, 385 U.S. 589, 603 (1967)).

secondary schools is protected under the First Amendment. Which way the court falls will likely depend on the judge's personal beliefs and the circuit in which they sit.

IV. Conclusion

There is not a lot of case law around First Amendment rights as applied to school curriculum decisions. From the jurisprudence that does exist, a strong argument could be made that anti-CRT legislation violates students' right to receive information. A First Amendment challenge based on teachers' right of free speech and academic freedom is less likely to succeed. However, the case law on this topic shows that there is a clear instinct among courts that the First Amendment must protect some aspects of speech within school settings. The jurisprudence has not drawn a clear line between what are permissible limitations on curricula and what limitations constitute First Amendment violations. It may very well be that it is impossible to distinguish a clear line, but it is almost certain that one exists. For example, a law banning all books written by Republicans from a school curriculum is definitely too far over this undefined line. No one believes that something like that is permissible, and no court would allow it to stand. Like the hypothetical law banning all books written by Republicans, anti-CRT legislation appears to be driven by political motivations. However, the case is not as clear-cut and it is less certain whether or not it violates First Amendment rights. Courts will need to decide whether the legislation falls under the school board's legitimate discretion to inculcate community values or whether the school board is unconstitutionally seeking to "prescribe what shall be orthodox in political, nationalism, religion, or other matters of opinion."[107]

[107] West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

APPENDIX A

States with Enacted Anti-CRT Legislation

State	Legislation Name	Description
Alabama	State Board Resolution	Alabama's board of education voted to pass a resolution in Oct. of 2021 that would ban schools from teaching "concepts that impute fault, blame, a tendency to oppress others, or the need to feel guilt or anguish to persons solely because of their race or sex."
Florida	State Board Resolution	In June 2021, Florida's board of education voted to approve a rule that prohibits schools from teaching critical race theory and the 1619 Project.
	HB7, a.k.a. the Stop W.O.K.E. Act	The Stop Wrongs Against Our Kids and Employees Act was passed by the Florida legislature on March 10, 2022. The Act will prohibit K-12 schools from using state funding to hire consultants that adhere to "critical race theory" and would give parents "private right of action" to sue if they believed their children were being taught the theory. It also prohibits employers from subjecting their employees to diversity training that implies someone is responsible for actions "committed in the past by other members of the same race, color, sex, or national origin."
Georgia	State Board Resolution	In June 2021, the board of education adopted a resolution against lessons about systematic racism that "indoctrinate" students or "promote one race or sex above another." The resolution also opposed instruction that discusses racism's role in the United States' founding. It also opposed awarding school credit for students working with advocacy groups.
Idaho	HB 377	The bill was signed into law on April 2021. It limits the discussion of critical race theory and how teachers can approach the topics of race and gender. More specifically, it prohibits schools from compelling students to "affirm, adopt, or adhere" to the following tenets (i) That any sex, race, ethnicity, religion, color, or national origin is inherently superior or inferior; (ii) That individuals should be adversely treated on the basis of their sex, race, ethnicity, religion, color, or national origin; (iii) That individuals, by virtue of sex, race, ethnicity, religion, color, or national origin, are inherently responsible for actions committed in the past by other members of the same sex, race, ethnicity, religion, color, or national origin." An amendment proposed in January 2022 would amend the law to allow individuals to file suit against school districts that they believe are violating this law.

Iowa	HB 802	In June 2021, this bill was passed prohibiting *mandatory* instruction and training on critical race theory in workplaces and schools, including public universities. The prohibited topics are labelled (1) "divisive concepts," (2) "race or sex scapegoating," and (3) "race or sex stereotyping."
Mississippi	SB 2113	The bill was signed into law in March 2022. The law purportedly prohibits "critical race theory," but the text of the bill doesn't define the theory. It specifically prohibits schools from compelling students to "affirm, adopt or adhere to" the following tenets: (1) any race, sex, ethnicity, or religion is inherently superior; (2) that individuals should be adversely treated on the basis of their sex, race, ethnicity, religion or national origin.
Montana	AG Binding Opinion	In May 2021, the Attorney General of Montana issued a binding opinion banning critical race theory and certain kinds of antiracism training in schools. The opinion is legally binding.
New Hampshire	HB 2	The state budget bill passed in June 2021 included a clause that banned teachers from discussing race, gender, and other identity characteristics in certain ways in class.
North Dakota	HB 1508	This bill was enacted in November 2021 and it prohibits the teaching of critical race theory in schools. It specifically bans instruction that suggests "racism is systemically embedded in American society and the American legal system to facilitate racial inequality."
Oklahoma	HB 1775	This bill was signed into law in May 2021 and it limits teaching on institutional racism, the myth of meritocracy, white privilege, and the concepts of critical race theory.
South Carolina	HB 4100	A provision in the state's budget bill prohibits schools from using state funding to teach concepts that show "an individual, by virtue of his race or sex, is inherently racist, sexist or oppressive, whether consciously or unconsciously" and "an individual should feel guilt, anguish or any other form of psychological distress on account of his race or sex."
South Dakota	Governor Executive Order	An executive order signed on April 5, ordered the state's department of education to review and remove from its policies, materials, standards, and trainings any "inherently divisive concepts."
	HB 1012	This bill was signed into law on March 28, 2022. It applies only to higher education institutions (e.g., universities), not K-12 schools. The bill prohibits the teaching of "divisive concepts," which is defined to include the idea that any race is superior or than any individual is racist because of their race.

Tennessee	HB 580/SB 623	This bill was enacted in May 2021 and it withholds funding from school districts if teachers tie certain events to institutional racism, white privilege, and critical race theory.
Texas	HB 3979/SB 3	HB 3979 was enacted in May 2021 and it prohibits teachers from engaging in "race or sex stereotyping," prevents schools from awarding credit for student service learning with advocacy groups, and bans schools from requiring teachers to discuss controversial issues. An updated version of this law (SB 3) was passed on December 2021, and it now mandates that teachers who discuss widely-debated issues must do so "free from political bias." The law also bars instruction that contributes to individuals feeling "blame, or guilt for actions committed by other members of the same race or sex." It further requires each school to send representatives to a civics training program and that parents have access to schools' learning management systems.
Utah	State Board Rule	The state board of education approved a rule in June 2021 that will ban any lessons on "harmful" critical race theory in K-12 public schools. Specifically, teachers cannot say that one race is "inherently superior or inferior" or that people's moral character is influenced by their race. They also cannot instruct the concept that individuals should bear responsibility for the past actions of others of their race.
Virginia	Governor Executive Order	The Governor of Virginia issued an executive order in January 2022 to eliminate all policies and instruction that promote "critical race theory," "divisive concepts," and "political indoctrination."

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CLERKSHIP APPLICATION WRITING SAMPLE

This writing sample is an excerpt from a brief I wrote regarding a fictional situation where Ms. Weber is suing her employer, Snowball Golf Company, on the basis of sex-based discrimination and unlawful retaliation under Title VII. I took the position of the golf company's lawyer. The argument excerpted in this sample deals solely with the issue of whether the golf company unlawfully retaliated against Ms. Weber in violation of Title VII. The fictional case is an appeal from a decision by the trial court to grant summary judgment to Ms. Weber. My client, the golf company, is now seeking to overturn the district court's ruling granting summary judgment. This writing sample has been lightly edited for grammar and I have received feedback on it from my professor.

QUESTION PRESENTED

1. Was the district court correct in granting summary judgment in favor of Snowball Golf Company, finding that the alleged hostile work environment and termination Brunhilda Weber faced did not constitution unlawful sex-based retaliation in violation of Title VII?

STATUTORY PROVISIONS

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

42 U.S.C. § 2000e-2

(a) Employer practices

It shall be an unlawful employment practice for an employer—
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he [the employee or applicant for employment] has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE FACTS

This case is about a dispute between an ex-employee and a successful company that takes pride in their friendly customer service and team-oriented work culture. The plaintiff has misunderstood the actions of the company and is now wrongfully accusing them of gender discrimination.

The Plaintiff-Appellant joined Snowball as a Customer Service Representative on January 15, 2016. R. at 7. Her duties included responding to phone and online customer service inquiries and following up with Snowball's accounting department to correct billing issues. Ms. Weber received a stellar annual employee review in her first year and was given an overall rating of "Excellent." R. at 7. However, her subsequent performance reviews consistently declined: she received an "Above Average" her second year (2017) and an "Average" rating her third (2018). R. at 8. The reviews noted that several customers had complained about her impatience and curtness on phone calls. All three reviews also noted that Ms. Weber failed to promptly report some customer billing issues to the accounting department. R. at 74-76.

On April 16, 2016, the CEO of Snowball, James Snow, emailed Ms. Weber's immediate supervisor, Damien White, expressing concerns about a complaint he had gotten about Ms. Weber from an important client, Pirate Pete. R. at 86. Pete Hathaway expressed disappointment with how Ms. Weber had treated him on the phone and complained that it felt like she was trying to get him off the phone. R. at 65. Mr. White then sent an email to Ms. Weber about the complaint and offered to help her improve her customer service. R. at 78. Ms. Weber never took him up on the offer. R. at 20.

During the Plaintiff's tenure at Snowball, the company hosted two of its annual seminars. R. at 20. Only a few employees were selected to go each year, and they were selected based on their performance, how they demonstrated the company's values, and their leadership potential.

R. at 21. Although the Plaintiff's performance to this point had been strong---albeit declining---the company did not select her because they felt she was lacking company values and leadership potential. R a 37. While only male employees attended the seminar in 2017, Cindy Heller, a female employee, was invited but declined to attend. R at 38.

Two years after she joined the company, Ms. Weber applied for the role of Associate Customer Service Representative, which is a higher-ranking position to the one Ms. Weber held at the time. R. at 8. The minimum qualifications for the promotion included: "unfailingly courteous, polite, and kind," "willingness to positively respond to feedback," and "attention to detail." R. at 69-70. It also mentions a preference to those who had attended the "Executive Training and Leadership Seminar." R. at 70. Ms. Weber interviewed for the position and in the interview did several customer-related "role-playing exercises." Mr. White noted that she did not demonstrate the "empathy or kindness" that they would like, the same struggle the Plaintiff had with her attitude with customers. R at 40.

On January 14, 2018, Ms. Weber was told that she had not been selected for the promotion. R. at 8. Snowball promoted five employees to the position, four men and one woman. R. at 8. On January 22, 2018, Mr. White initiated a routine check-in with Ms. Weber and during this meeting, she asked him "if he thought it made sense that four out of the five people who ended up being promoted were men." R. at 23, 42. Mr. White inferred her concerns about discrimination and immediately reassured her that gender had not been a factor in their decision. R. at 41-42. Mr. White later sent a note to Mr. Snow about this conversation, but both dismissed it as a disgruntled employee venting about a missed promotion and "no big deal." R. at 91-92.

In the subsequent months, Ms. Weber's overtime hours decreased from an average of nineteen hours a month to around ten. R. at 83. Mr. White, who is in charge of approving overtime hours, explained that not as much overtime was needed, given that the company had

just promoted several employees who could pick up the slack. R. at 43. All the employees, not just Ms. Weber, experienced a drop in overtime hours, albeit by a lower percentage. R. at 43.

In the same months, two male non-management level coworkers, Liam Green and John Brown, used the term "Ice Queen" to refer to Ms. Weber two or three times. R. at 26, 55. The two also played a joke wherein they placed a bucket of ice on Ms. Weber's chair before a lunch meeting. R. at 26. Ms. Weber was upset by this incident and sent an email complaint to her supervisor on November 1, 2018. R. at 84. Mr. White immediately responded that he would talk to Mr. Brown, after which both parties agree that the name-calling and pranks completely stopped. R. at 56.

On December 17, 2018, Ms. Weber received a notice of termination from the company. R. at 9. This termination was initiated directly by the CEO, James Snow, who had gotten an automated alert on his computer about Ms. Weber's continually decreasing performance. R. at 67. He set this alert because of a bad experience he had with a previous employee who had started out performing outstandingly before his performance declined, and he ended up losing the company a major client. R. at 71. Mr. Snow said that this alert, combined with his memory of Pirate Pete's complaint about her, motivated him to terminate Ms. Weber's employment. R. at 67.

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ARGUMENT

II. THE DISTRICT COURT WAS CORRECT TO GRANT SUMMARY JUDGMENT ON THE ISSUE OF RETALIATION BECAUSE PLAINTIFF HAS FAILED TO MAKE A PRIMA FACIE CASE.

The district court granted summary judgment because there exists no genuine dispute of material fact as to whether Weber was subjected to a hostile work environment or terminated in retaliation for complaining about sex discrimination. The plaintiff has failed to make a prima facie case of unlawful retaliation under the *McDonnell Douglas* framework. In addition, even if she could state a prima facie case of retaliation, the defendant's explanation for the termination is legitimate, and the plaintiff has failed to raise any genuine issue of material fact that defendant's explanation was pretextual.

A. The Plaintiff Has Failed to Establish a Prima Facie Case of Retaliation.

In order to establish a prima facie case of retaliation, the plaintiff must show that (1) she engaged in an activity that is protected under Title VII; (2) Snowball subsequently subjected her to an adverse employment decision; and (3) there is a causal link between the protected activity and the employer's action. *Yartzoff v. Thomas*, 809 F.2d 1371, 1374 (9th Cir. 1987). The plaintiff has failed on all three counts.

1. The Plaintiff Did Not Engage in Activity Protected Under Title VII Because Her Complaints Were Too Informal to be Considered a Protected Activity and Her Second Complaint Was Not About Behavior Prohibited by Title VII.

The plaintiff alleges that she made two protected complaints: the first when she complained to Mr. White that she suspects she had not been promoted because of sex discrimination and the second when she complained to him about harassment by male colleagues. R. at 23, 42, 84. However, the evidence suggests that neither of these were formal complaints and therefore do not constitute protected activities as a matter of law. Under 42

U.S.C. §2000e-3(a), a complaint by an employee that a supervisor has violated Title VII may constitute a protected activity for which the employer cannot lawfully retaliate. *Trent v. Valley Elec. Ass'n Inc.,* 41 F.3d 524, 526 (9th Cir. 1994). The statute does not, however, define what qualifies as a complaint for the purposes of the law, but certainly not all negative comments are included. It is unlikely that an offhand comment to a colleague would cause an employer to retaliate and therefore, no reasonable person could think that it is a legitimate basis for a retaliation claim.

The plaintiff's first complaint alleging discriminatory promotion practices falls somewhere between a formal complaint that definitively qualifies and a trivial one that does not. Past precedent suggests that the environment and the way in which the complaint is made needs to indicate clearly to the employer that the employee has serious Title VII-related concerns and is opposing an allegedly discriminatory employment practice. Complaints that have qualified in the past include plaintiffs filling out employer forms, following a process designated by the employer's human resources department, filing a complaint with the Equal Employment Opportunity Commission, and initiating a conversation with a manager and outlining why the plaintiff believes discrimination has taken place. *See, e.g., Clark County Sch. Dist. V. Breeden,* 532 U.S. 268 (2001) (plaintiff filed a complaint with the EEOC), *Trent,* 41 F.3d at 525 (plaintiff submitted a written complaint to manager).

In contrast to the cases in which this court has typically found a complaint, Ms. Weber did not even come to Mr. White on her own and instead brought up her concerns in an informal check-in that he initiated. R. at 23. In *Williams v. City of Bellevue,* the plaintiff alleged that he was fired in retaliation of his complaint about a racist text message sent by his coworker. 740 Fed. Appx. 148, 149 (9th Cir. 2018). Similar to this case, the plaintiff's complaint constituted a conversation that his police chief initiated when he came to the plaintiff and asked if he found

this message offensive, to which he replied yes. *Id.* This court held that the plaintiff's conversation with his police chief did not rise to the level of protected activity. *Id.* Moreover, the plaintiff in this case did not explicitly address the issue; instead, she asked in a roundabout way "if he (Mr. White) thought it made sense that four of the five people who ended up being promoted were men." R. at 23. When Mr. White answered that many factors were considered in the promotion process, Ms. Weber did not press further, and after the meeting, she did not file a formal complaint through Snowball's official complaint system. R. at 24.

There is further evidence that neither Mr. White nor Mr. Snow treated her concerns like a formal complaint. In an email Mr. White sent to Mr. Snow about the meeting, he said "she probably just wanted to vent." R. at 91. If the employer did not see this interaction as a serious complaint, then it is unreasonable to conclude that the employee has engaged in a protected activity that could engender retaliation.

In her second alleged complaint, Ms. Weber likewise failed to use Snowball's formal complaint system. She instead sent a short email to Mr. White regarding the use of the term "Ice Queen" and the ice cube incident, saying "I would appreciate it if you could talk to John and get him to stop." R. at 84. Mr. White immediately responded and said he would talk to him, after which both parties agree that the "Ice Queen" comments stopped. R. at 56, 84. In this case, Ms. Weber failed to even imply discriminatory practices, instead merely saying that "I don't think these comments come from a good place, and I find them offensive." R. at 84. Thus, even if this was a complaint within the terms of the statute, it does not complain about behavior that falls under actions prohibited by Title VII and is not subject to Title VII protections.

2. The Plaintiff Was Not Subject to Adverse Employment Actions in the Form of a Denial of Overtime and a Hostile Work Environment.

The plaintiff has also failed to show that there is a genuine issue of material fact as to whether she suffered adverse employment actions in the form of a denial of overtime and a hostile work environment. Under *Burlington Northern & Santa Fe Ry. v. White,* to constitute an adverse employment action, the plaintiff must show that a reasonable employee would have found the action materially adverse, meaning it would have dissuaded a reasonable employee from making discrimination claims. 548 U.S. 53, 57 (2006). It is unlikely that a reduction of nine overtime hours a month would dissuade a plaintiff from making discrimination claims when in that same month, the average employee also saw their overtime hours reduced. It is not clear at all that Ms. Weber was disproportionately affected compared to her coworkers. While it is true that her decrease was higher than the average, we do not have any information about how the data pans out. R. at 83. There could potentially be many outliers which makes the average a misleading representation of the reality.

Similarly, it is highly unlikely that a few offhand comments by coworkers that referred to her as "Ice Queen" would dissuade a reasonable person from making discrimination claims. Under *Faragher v. City of Boca Raton,* only harassment that is so severe and pervasive as to alter the conditions of a victim's employment and create an abusive working environment violates Title VII. 524 U.S. 775, 780 (1998) This court, in *Ellison v. Brady*, noted that these requirements are necessary "in order to shield employers from having to accommodate the idiosyncratic concerns of the rare hyper-sensitive employee." 924 F.2d 872, 876 (9th Cir. 1991). The court in *Faragher* used four factors to determine whether conduct amounted to adverse employment action: (1) the frequency of the discriminatory conduct, (2) its severity, (3) whether the conduct is physically threatening or humiliating, and (4) whether the conduct unreasonably interferes with an employee's work performance. *Faragher* 524 U.S. at 782. Under the *Faragher* test,

simple teasing, offhand comments, and isolated incidents, unless extremely serious, will not amount to discriminatory changes in the terms and conditions of employment. *Id.* at 782.

The facts in this matter do not show the kind of pervasive, sustained conduct that this court has characterized as an adverse employment action. The two perpetrators of these incidents were not management-level coworkers and both John Brown and Liam Green testified that they only used the term "Ice Queen" a couple of times and stopped completely after Mr. White had a talk with them. R. at 26, 55. In comparison to *Harris v. Forklift Sys.*, 510 U.S. 17, 19 (1993), where the court did find adverse employment action, the president of the company called the plaintiff a "dumb ass woman" and frequently made sexual innuendos. The alleged harassment in this case occurred only a couple of times, was not severe, did not physically threaten or humiliate Ms. Weber, and did not interfere with Ms. Weber's work.

3. There is Little to No Evidence That the Alleged Adverse Employment Actions Were Instigated in Reaction to Either of the Plaintiff's Two Complaints.

Even if we assume that the plaintiff has met her burden of production to establish that she engaged in protected activities and her employer subjected her to adverse employment actions, the plaintiff has failed to show a sufficient causal link between the two. In a Title VII retaliation claim, a plaintiff can show a causal link through either direct evidence or specific and substantial circumstantial evidence. *Manatt v. Bank of Am.*, 339 F.3d 792, 803 (9th Cir. 2003). In this case, the plaintiff relies exclusively on circumstantial evidence based on the temporal proximity of the complaints and the adverse actions. However, the court in *Clark County Sch. Dist. v. Breeden*, noted that "the cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case of retaliation uniformly hold that the temporal proximity must be very close." 532 U.S. 268, 272 (2001).

The plaintiff has failed to establish temporal proximity in this case because the first alleged complaint and the termination notice occurred eleven months apart. In comparison, the court held that the plaintiff in *Stegall v. Citadel Broad Co.* successfully demonstrated a causal link because she was fired only nine days after making a gender discrimination complaint to her manager. 350 F.3d 1061, 1062 (9th Cir. 2003). There was also additional circumstantial evidence in that the plaintiff's manager in *Stegall* repeatedly called her "slut", "bitch", and "whore," and there was testimony that the manager pressed to have her fired in management-level meetings. *Id.* at 1063. There is no such additional evidence here. Rather, Mr. Snow characterized the plaintiff's complaint as just everyday work drama because she did not use the official complaint system. In an email to Mr. White, he remarked that the complaint was "no big deal" and Mr. White responded, "She probably just wanted to vent." R. at 91. This shows that it was highly unlikely that the plaintiff's complaint about discriminatory practices and Mr. Snow's subsequent decision to file her were causally linked.

As for the plaintiff's second complaint about her coworker's remarks and the ice cube incident, there is likewise insufficient evidence to show a causal link. The plaintiff again relies solely on temporal proximity, but the complaint and the termination notice are a month and a half apart. Moreover, both parties agree that the termination notice came directly from James Snow, who was not aware of the plaintiff's second complaint, so it could not have influenced his decision to terminate her employment.

B. Snowball Has Legitimate Business Reasons for its Employment Actions.

Assuming arguendo that the plaintiff has established a prima facie case of retaliation, the defendant has offered a reasonable explanation for her termination and the plaintiff has failed to meet her burden of production to show that Snowball's proffered reasons were pretextual as a matter of law. A plaintiff can show pretext in two ways: either directly by persuading the court

that a discriminatory reason was more likely to have motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. *Stegall* 350 F.3d at 1064. The defendant based the termination on poor performance by the plaintiff, who followed a consistent downward trend during her time at the company.

Ms. Weber's decreasing performance was well documented. The plaintiff's year-end performance reviews decreased from "Excellent" to "Average" over the course of the three years she spent at the company. R. at 74-76. Mr. Snow further testified that his computer was set to alert him when an employee's performance continually dropped to this extent, and that was the catalyst for his decision to terminate her. R. at 67. This was due to a prior bad experience Mr. Snow had with an employee that cost the company a major client. This employee also started out with stellar performance reviews and because of this, Mr. Snow made excuses for him when his performance began to drop. R. at 71. This previous experience has made Mr. Snow understandably wary of employees whose performance continually decreases, no matter where they started off from. In addition, a major client, Pete Hathaway from Pirate Pete's, complained about the plaintiff's customer service directly to Mr. Snow, who then sent an email to her supervisor saying "I don't want to get these complaints again!" R. at 86. It is reasonable that this incident, combined with her declining performance reviews, would induce Mr. Snow to terminate the plaintiff's employment, despite her initial stellar performance.

In comparison with the substantial evidence supporting the defendant's explanation, the plaintiff has offered scant evidence that a discriminatory reason was more likely the motivating factor for her termination. She bases her allegations on the fact that the company uses purportedly coded language to discriminate against female employees by calling her "cold". The plaintiff claims that this is coded language based on old stereotypes about "cold" women. For example, her supervisor, Mr. White, wrote to her in an email after he received a complaint about

her performance from a customer: "I suggest working on being warmer" and "customers hate talking with a cold person." R. at 78. However, Mr. White commonly used this supposedly "coded" language, including with men. In John Brown's performance review, his supervisor likewise noted that "he needs to start being warmer to customers." R. at 87. In a subsequent review where Mr. Brown had improved from a rating of Average to Above Average, Mr. White similarly noted that "John has developed a warmer disposition." R. at 88. This shows that Mr. White uses "warm" and "cold" to describe customer service attitudes with both male and female employees and it is therefore not coded language that signals a discriminatory environment.

Where direct evidence is unavailable, the plaintiff is required to produce "specific" and "substantial" circumstantial evidence of pretext to survive summary judgment. *Godwin v. Hunt Wesson, Inc.,* 150 F.3d 1221, 1222 (9th Cir. 1998). The plaintiff has failed on both counts and she has not met her burden of production to establish that the employer's motives were different from its stated motives.

Applicant Details

First Name	**Samuel**
Last Name	**Waranch**
Citizenship Status	**U. S. Citizen**
Email Address	**swaranch@pennlaw.upenn.edu**
Address	**Address** Street **1904 Pine St. Apt. 1** City **Philadelphia** State/Territory **Pennsylvania** Zip **19103** Country **United States**
Contact Phone Number	**9727429005**

Applicant Education

BA/BS From	**Oberlin College**
Date of BA/BS	**May 2019**
JD/LLB From	**University of Pennsylvania Carey Law School** **https://www.law.upenn.edu/careers/**
Date of JD/LLB	**May 20, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**University of Pennsylvania Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Pritchett, Wendell
pritchet@law.upenn.edu
Heaton, Paul
pheaton@law.upenn.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Samuel I. Waranch
1904 Pine St. Apt. 1 Philadelphia, PA 19103 • (972) 742-9005 • swaranch@upenn.pennlaw.edu

April 26, 2022

The Honorable Colleen Kiyo A Matsumoto
United States District Court
Eastern District of New York
Theodore Roosevelt United States Courthouse
225 Camden Plaza East
Brooklyn, NY 11201

Dear Judge Matsumoto,

I hope you are well. I am writing to request your consideration of my application for a clerkship beginning in the fall of 2025 following two years of experience at a litigation-only firm in New York. Originally from Dallas, I am a third-year law student at the University of Pennsylvania Carey Law School.

Enclosed are my resume, transcript, and writing samples. Letters of recommendation from Professor Paul Heaton (pheaton@law.upenn.edu, 215-746-3353), Professor Regina Austin (raustin@law.upenn.edu, 215-898-5185), and Interim University President Wendell Pritchett (pritchet@law.upenn.edu, 215-898-7227) are also provided. The Honorable Michael A. Shipp, of the District of New Jersey, and his career clerk, Frances Huskey, can also be reached as references at 609-989-2009. Please let me know if any additional references or information is needed.

Sincerely,

Samuel I. Waranch

Samuel I. Waranch

1904 Pine St. Apt. 1, Philadelphia, PA 19103 • 972-742-9005 • swaranch@pennlaw.upenn.edu

EDUCATION

University of Pennsylvania Carey Law School, *Philadelphia, PA* May 2023
J.D. Candidate
Honors: *University of Pennsylvania Law Review*, Senior Editor
Activities: Criminal Law with Professor Paul Heaton, Teaching Assistant
Custody and Support Assistance Clinic, Legal Advocate
Intramural Mock Trial, Participant
Penn Law Ultimate Frisbee, Founder and Co-President

Oberlin College, *Oberlin, OH* May 2019
B.A., Political Science
Honors: Dean's Fellowship, Cole Scholar in Electoral Politics
Activities: Oberlin College Chess Team, Captain of Team, Three-Time "Small College" National Champion
Student Senate, Student Life Committee Chair

EXPERIENCE

Quinn Emanuel Urquhart & Sullivan, *New York, NY* Summer 2022
Summer Associate

Federal Community Defender Office, Eastern District of Pennsylvania, *Philadelphia, PA* Fall 2021
Extern, Capital Habeas Unit

- Drafted and edited habeas petitions in capital cases.
- Wrote memoranda addressing discreet legal questions to aid supervising attorneys.

United States District Court, District of New Jersey, *Trenton, NJ* Summer 2021
Judicial Intern, Hon. Michael A. Shipp

- Drafted opinions for a variety of civil and criminal cases and edited pending opinions.
- Served collaboratively on trial teams to brief the judge on motions in limine and synthesize points of dispute.

National Museum of American Jewish History, *Philadelphia, PA* Spring 2020
Academic Liaison Intern

- Assisted in the creation and implementation of seasonal academic initiatives.
- Interviewed and recruited prospective summer interns.

Varsity Tutors, *Philadelphia, PA* September 2019 – August 2020
LSAT Tutor

- Tutored the LSAT to aspiring law students in-person and online and developed individually tailored curricula.
- Served as a pro-bono tutor to prospective law students from underserved backgrounds.

Oberlin Politics Department, *Oberlin, OH* Fall 2018
Research Assistant

- Coded U.S. Congressional websites to aid in data collection and analysis for a National Science Foundation sponsored paper.
- Identified salient political trends across aspiring U.S Congressional members' campaign websites.

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INTERESTS

Chess; Ultimate Frisbee; Cooking

Samuel I. Waranch – Penn Law Transcript

Spring 2022

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Private Action: Antitrust, Rico, and Class Action	Howard Langer	A	3	
Visual Legal Advocacy	Regina Austin	A	2	Recommender
Evidence	David Rudovsky	B+	4	
Business Management	Rahul Kapoor	Credit	3	
Teaching Assistant – Criminal Law	Paul Heaton	Credit	2	Recommender
Law Review	N/A	Credit	1	

Fall 2021

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Land Use in Practice	Thomas Witt	A	2	
Visual Legal Advocacy	Regina Austin	A	2	Recommender
Appellate Advocacy	Matthew Duncan	B+	3	
Federal Defenders Office Externship – Capital Habeas Unit	N/A	Credit	6	
Law Review	N/A	Credit	1	

Spring 2021

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Land Use Law	Wendall Pritchett	A	3	Recommender
Law and Society in Japan	Eric Feldman	A-	3	
Torts	Jacques DeLisle	B+	4	
Constitutional Law	Seth Kreimer	B+	4	
Legal Practice Skills	Jessica Simon	Credit	3	
Legal Practice Skills (Cohort)	Conor Ferrall	Credit	N/A	

Fall 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Criminal Law	Paul Heaton	A-	4	Recommender
Civil Procedure	Tobias Barrington Wolff	B+	3	
Contracts	Jean Galbraith	B+	3	
Legal Practice Skills	Jessica Simon	Credit	3	
Legal Practice Skills (Cohort)	Conor Ferrall	Credit	N/A	

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

April 26, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Re: Clerkship Applicant Samuel Waranch

Dear Judge Matsumoto:

I write regarding Sam Waranch, who has applied to your office for a clerkship. Sam is an exceptionally strong student, among the best in his class. He would make an excellent clerk and serve your chambers well. I endorse him enthusiastically and urge you to hire him.

I had the pleasure to teach Sam in my first-year class Land Use Law and Policy. Even though the class was online due to COVID, it was a very engaged experience, and Sam was one of the most thoughtful participants. Sam was active our discussions, and his comments made significant contributions. Sam has deep interest in government, and he frequently drew upon his interests and experiences to advance our conversations. His approach to the cases and other materials was particularly rigorous and his analysis consistently creative.

My land use class is a writing intensive one, requiring two papers. Sam's were among the very top in the class. He is a strong, thorough, and thoughtful writer. In his final paper for the class, Sam wrote an excellent analysis of the rules of street access and the constant tensions among the many different users of the streets (residents, businesses, pedestrians and cars being the most active). Sam adeptly wove class materials, primary research, and policy analysis to produce a paper that makes meaningful recommendations for legal reform to mediate these tensions. I was very impressed. As you can see from Sam's transcript, his performance in the law school has been very strong. He is one of the very best students in what the Dean has described as one of the strongest classes in the school's history.

In addition to his scholarly accomplishments, Sam has a deep commitment to public service, and he is active in several law school organizations. Sam is a leader of the law school chapter of the American Constitution Society as well as our high school Mock Trial program, supporting students in learning about our litigation system and developing the critical skills of analysis and oral presentation. Sam spent his 1L summer interning for Judge Michael Shipp, where he received excellent training and further developed his research and writing skills. He will come to your office ready to contribute on his first day.

Sam's passion for public service was developed long before he arrived at Penn. During his college years, he was active in many political and public service activities. Outside of class, I have discussed issues of public policy with him. Sam has spent a great deal of time thinking about the role of government and lawyers in American society, and he has nuanced views on many current issues. I expect Sam to make major contributions to the field of public interest law.

Through several encounters outside of class, I have gotten to know Sam. He is a warm and thoughtful person. He is hard-working, unassuming, supportive of others and clearly well-respected by his peers. I believe that Sam will be a leader in whatever field of law he chooses, and I expect to be bragging about him for years to come. You could not pick a better person for your office.

Please don't hesitate to contact me if I can provide any additional information.

Sincerely,

Wendell E. Pritchett, J.D., Ph.D.
Presidential Professor of Law and Education
pritchet@law.upenn.edu
215-898-7483

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

April 26, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Re: Clerkship Applicant Samuel Waranch

Dear Judge Matsumoto:

I am a faculty member at the University of Pennsylvania Carey Law School and am writing this letter in support of Sam Waranch, who is applying for a clerkship. Sam was a 1L student in my criminal law course in 2020 and he worked as a teaching assistant (TA) for me for the same course in 2022. If you are looking for a clerk who is does high-quality work and is a great team player, Sam would be a great choice. I enthusiastically recommend him.

I approached Sam to work for me as a TA because he was among the top students when he took my course as a 1L. In addition to demonstrating mastery of the class material, Sam also was a consensus-builder in group discussions and prioritized listening to others over pushing out his own views. During his time as a TA, Sam teamed with two other TAs, and he again demonstrated his others-first approach to collaborative work, exhibiting an admirable flexibility and willingness to adapt his efforts to the needs of the group. If there was an assignment that one of the other TAs had a conflict with or didn't feel comfortable completing, Sam was happy to step in to make sure the work was done. He was also responsive to feedback and genuinely interested in identifying ways he could improve and become a better team member.

In addition to doing the normal TA tasks of curating class notes, leading review sessions, and meeting with students, Sam organized and led two supplementary lectures during the term—one summarizing recent empirical studies on prosecutor charging decisions in criminal cases, and another discussing the habeas process in death penalty cases. For the former lecture, he fielded an online survey that provided police reports on a case and asked class members to report how they would charge the case; Sam collected student responses in advance and then compared them to the actual responses of hundreds of prosecutors who completed a similar exercise in a published research study. It was an innovative way to present this material that really engaged the students and got them talking about how prosecutors should and do perform their work. Indeed, the author of the original study on which Sam based his lecture (a professor at another university) requested Sam's lecture materials once she heard about this creative way that he found to present the material.

One thing I particularly appreciated about both of Sam's lectures is that he took the time to explain, before he got into the substantive content of the discussion, the why of what we were learning by clearly outlining for the students how the particular content we would discuss could be useful in their future careers, whether or not they chose to pursue criminal work. Sam's big-picture, strategic way of thinking about the world was more broadly evident in my interactions with him. For example, when we'd talk about a lecture or other assignment, Sam was always very thoughtful about making sure he first clearly understood the end goal we were trying to further through the work before getting into the details of the task. This allowed him to make sure he was closely aligning his day-to-day activities with the broader vision I had for our students' growth throughout the semester.

To summarize, Sam is smart, easy to get along with, and flourishes in a team setting. He will be an excellent clerk and will make a meaningful contribution to any chambers. If you have any questions about Sam or if I can be of further assistance, please don't hesitate to reach out to me.

Warmly,

Paul Heaton
Senior Fellow and Academic Director
Quattrone Center for the Fair Administration of Justice
pheaton@law.upenn.edu
215.746.3353

Samuel I. Waranch
1904 Pine St. Apt. 1 Philadelphia PA, 19103 • (972) 742-9005 • swaranch@upenn.pennlaw.edu

Writing Sample: Cover Sheet

The attached writing sample represents my final version of an opinion. I wrote it during my first-year summer judicial internship. To preserve confidentiality, citations to the record, the parties' names, dates, and the judge's name have been changed. I conducted all the research for this assignment independently; the writing is mine alone.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ROBIN'S RESTAURANT, INC. Plaintiff, v. WESTERN INSURANCE GROUP, Defendant.	Civil Action No. 21-12345 (KMJ) **DRAFT OF MEMORANDUM OPINION**

JONES, District Judge

This matter comes before the Court upon Defendant Western Insurance Group's ("Defendant") Motion to Dismiss Plaintiff Robin's Restaurant ("Plaintiff") Complaint. (ECF No. 4.) Plaintiff opposed (ECF No. 8), and Defendant replied (ECF No. 12). The Court has carefully considered the parties' submissions and decides the matter without oral argument pursuant to Local Rule 78.1. For the reasons set forth herein, Defendant's Motion to Dismiss is granted.

I. BACKGROUND

This case is one of many emerging COVID-19-related insurance disputes. Plaintiff owns and operates a chain of sit-down restaurants throughout New Jersey. (Complaint ¶ 11, ECF No. 1.) Defendant is an insurance company based in New York. (*Id.* ¶ 12.) From July 15, 2019, to July 15, 2020, Defendant insured Plaintiff for business interruption losses, including "business personal property, business income and extra expense, [and] contamination coverage," through their insurance policy (the "Policy"). (*Id.* ¶ 18.) According to Plaintiff, "[t]he Policy is an all-risk policy,

insofar as it provides that covered perils under the policy means physical loss or physical damage unless the loss is specifically excluded or limited in the Policy." (*Id.* ¶ 24.)

On March 9, 2020, New Jersey Governor Phil Murphy "issued a Proclamation of Public Health Emergency and State of Emergency, the first formal recognition of an emergency situation in the State of New Jersey as a result of COVID-19." (*Id.* ¶ 52.) Shortly thereafter, Governor Murphy issued orders requiring non-essential businesses to cease operations and close all physical locations followed by a Stay-at-Home Order for all residents of New Jersey. (*Id.* ¶ 55.) These orders required the closure of the "brick-and-mortar premises of all non-essential retail businesses . . . as long as th[e] Order remains in effect." (*Id.* ¶ 56.) Plaintiff complied with these orders and suspended its operations. (*Id.* ¶ 59.) Plaintiff alleges that its "compliance with these mandates resulted in [it] suffering business losses, business interruption[,] and extended expenses of the nature that the Policy covers and for which [its] reasonable expectation was that coverage existed in exchange for the premiums paid." (*Id.* ¶ 61.)

Plaintiff, subsequently, submitted a claim for business losses pursuant to the Policy, but Defendant rejected the claim. (*See generally* Claim Denial Letter, ECF No. 2-8.) On November 14, 2020, Plaintiff filed the instant four-count action against the Defendant. (*See generally* Complaint.) Count One asserts a claim for declaratory relief. Plaintiff argues that Governor Murphy's orders trigger coverage under the policy and that "the Policy provides coverage to Plaintiff for any current and future closures of businesses such as Plaintiff's due to physical loss or damage and the policy provides business income coverage in the event that a loss or damage at the Insured Properties has occurred." (*Id.* ¶¶ 68, 73.) Counts Two through Four assert claims for breach of contract based on Defendant's denial of coverage under the Policy's Business Income, Extra Expense, and Civil Authority Endorsements. (*Id.* ¶¶ 83-108.)

II. LEGAL STANDARD

Rule 8(a)(2)[1] "requires only a 'short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

When analyzing a Rule 12(b)(6) motion to dismiss, the district court conducts a three-part analysis. *Malleus v. George*, 641 F.3d 560, 563 (3d Cir. 2011). First, the court must "tak[e] note of the elements a plaintiff must plead to state a claim." *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009). Second, the court must accept as true all of a plaintiff's well pleaded factual allegations and construe the complaint in the light most favorable to the plaintiff. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009). The court, however, may ignore legal conclusions or factually unsupported accusations that merely state "the-defendant-unlawfully-harmed-me." *Iqbal*, 556 U.S. at 678 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Finally, the court must determine whether the "facts alleged in the complaint are sufficient to show that the plaintiff has a 'plausible claim for relief.'" *Fowler*, 578 F.3d at 211 (quoting *Iqbal*, 556 U.S. at 679). A facially plausible claim "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 210 (quoting *Iqbal*, 556 U.S. at 678). On a motion to dismiss for failure to state a claim, the "defendant bears the burden of showing that no claim has been presented." *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005).

III. DISCUSSION

Both Plaintiff and Defendant agree that New Jersey law controls in this case. The question at issue here is the proper interpretation of the Policy. Under New Jersey Law, the

[1] All references to a "Rule" or "Rules" hereinafter refer to the Federal Rules of Civil Procedure.

interpretation of a contract is a question of law. *Buczek v. Cont'l Cas. Ins. Co.*, 378 F.3d 284, 288 (3d Cir. 2004). In the instant case, Defendant's "All-Risk" Policy does not contain a "virus exclusion" which this court and others in the district have routinely enforced as barring coverage for COVID-19 related claims. *See Quakerbridge Early Learning LLC v. Selective Ins. Co. of New England*, 2021 WL 1214758, at *4 (D.N.J. Mar. 31, 2021); *Benamax Ice, LLC. v. Merch. Mut. Ins. Co.*, 2021 WL 1171633, at *4 (D.N.J. Mar. 29, 2021); *Chester C. Chianese DDS LLC v. Travelers Cas. Ins. Co. of Am.*, 2021 WL 1175344, at *1 (D.N.J. Mar. 27, 2021). The Court's job is thus to interpret the Policy to determine if coverage is appropriate in the absence of such an exclusion.

In interpreting insurance contracts under New Jersey Law, the state has routinely held that "[a]n insurance policy is a contract that will be enforced as written when its terms are clear in order that the expectations of the parties will be fulfilled." *Flomerfelt v. Cardiello*, 997 A.2d 991, 996 (N.J. 2010). "In attempting to discern the meaning of a provision in an insurance contract, the plain language is ordinarily the most direct route." *Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am.*, 948 A.2d 1285, 1289 (N.J. 2008). "If the language is clear, that is the end of the inquiry." *Id.* "If the plain language of the policy is unambiguous," the Court should not engage in a strained analysis to "support the imposition of liability or write a better [contract] . . . than the one purchased." *Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 129 A.3d 1069, 1075 (N.J. 2016) (quoting *Chubb*, 948 A.2d at 1289). Finally, "[e]xclusionary clauses are presumptively valid and are enforced if they are 'specific, plain, clear, prominent, and not contrary to public policy.'" *Flomerfelt*, 997 A.2d 991, 996 (N.J. 2010) (quoting *Princeton Ins. v. Chunmuang*, 698 A.2d 9, 17 (N.J. 1997)). Plaintiff's breach of contract and declaratory judgment claims thus require it to establish that they are "entitled to coverage

within the basic terms of the [Policy]." *Ralph Lauren Corp. v. Factory Mut. Ins. Co.*, 2021 WL 1904739, at *3 (D.N.J. May 12, 2021) (internal quotations and citation omitted).

The parties dispute the proper interpretation of the Policy whose coverage is triggered by "direct physical loss of or damage to" the covered properties. The Business Income endorsement explains that,

> [w]e will pay for the actual loss of Business Income you sustain due to the necessary 'suspension' of your 'operations' during the 'period of restoration.' The 'suspension' must be caused by direct physical loss of or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss.

(Policy *52.) Similarly, the Extra Expense Endorsement states that "Extra Expense means reasonable and necessary expenses you incur during the 'period of restoration' that you would not have incurred if there had been no direct physical loss of or damage to property caused by or resulting from a Covered Cause of Loss." (*Id.* at *53.) The Civil Authority Provision likewise conditions coverage on "direct physical loss of or damage to property at locations, other than described premises, caused by or resulting from a Covered Cause of Loss." (*Id.* at *79.)

Plaintiff alleges breach of contract for Defendant's denial of coverage for its COVID-19 related losses under either the Business Income, Extra Expense, or Civil Authority endorsements of the Policy. Defendant challenges coverage under these endorsements.

A. Loss of Use of Covered Property Stemming from Government Orders Does Not Constitute Direct Physical Loss or Damage.

A plain reading of the unambiguous language of the Policy reveals that coverage is conditioned for "physical loss of or damage" to covered property caused by or resulting from a "Covered Cause of Loss." Plaintiff alleges that orders preventing use of their covered properties

amounts to physical loss or damage because of COVID-19 or the apparent future threat of it. (Comp. ¶¶ 27, 35, 59-60.)

In the instant case, Plaintiff's complaint fails to allege specific COVID-19 contamination. When the "[c]omplaint lacks any allegations about the existence of anything affecting the physical condition of its premises . . . its losses are a loss of use untethered from the physical condition of the property itself." *TAQ Willow Grove, LLC. v. Twin City Fire Ins.*, 2021 WL 131555, at *5 (E.D. Pa. Jan. 14, 2021); *See also SSN Hotel Mgmt., LLC. v. Harford Mut. Ins. Co.*, No. 20-6228, 2021 WL 1339993, at *4 (E.D. Pa. Apr. 8, 2021). "[T]hese allegations are insufficient." *Ralph Lauren Corp. v. Factory Mut. Ins. Co.*, No. 20-010167, 2021 WL 1904739, at *3 (D.N.J. May 12, 2021); *See also Mac Prop. Grp. LLC. v. Selective Fire & Cas. Ins. Co.*, No. L-2629-20, 2020 WL 7422374, at *8–9 (N.J. Super. Ct. Nov. 5, 2020) (finding "no direct physical loss or damage to property" resulting from an "order of civil authority" addressing COVID-19).

As more and more courts deal with COVID-19 related insurance claims, the consensus that has emerged in this circuit is that the loss of use of covered properties stemming from a civil authority order is insufficient to cause direct physical loss or damage. In *Port Authority of New York and New Jersey*, the third circuit addressed the interpretation of the phrase "direct physical loss or damage" under New Jersey law in the context of insurance claims for asbestos damage. *See Port Auth. Of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 235 (3d Cir. 2002). The Court concluded that physical damage to property meant "distinct, demonstrable, and physical alteration of its structure." *Id.* (quoting 10 Couch on Ins. §148:46 (3d ed. 1998)). Damages by things unnoticeable to the naked eye must meet a higher standard than those that can easily damage a building. *Id.* at 235.

The line of cases Interpreting *Port Authority* in the context of COVID-19 related insurance disputes clearly "are instructive on whether the threat of COVID-19 constitutes 'direct physical loss or direct physical damage to property.' These [recent] decisions have **almost uniformly concluded that such a threat does not trigger insurance coverage**." *Hair Studio 1208, LLC v. Hartford Underwriters Insur. Co.*, No. 20-2171, 2021 WL 1945712, at *7 (E.D. Pa. May 14, 2021) (emphasis added); *See*, e.g., *Id.; Ralph Lauren Corp. v. Factory Mut. Ins. Co.*, No. 20-010167, 2021 WL 1904739, at *3 (D.N.J. May 12, 2021); *Paul Glat MD, P.C. v. Nationwide Mut. Ins. Co.*, No. 20-5271, 2021 WL 1210000, at *5–6 (E.D. Pa. Mar. 31, 2021); *Chester Cty. Sports Arena v. The Cincinnati Specialty Underwriters Ins. Co.*, 2021 WL 1200444, at *7 (E.D. Pa. Mar. 30, 2021).

In response to Defendant's motion to dismiss, Plaintiff cites out of circuit decisions to support the proposition that "a condition that renders property unsuitable for its intended use constitutes a direct physical loss" (Pl.'s Opp'n Br. *13). Plaintiff alleges that even "fear of damage can be a direct physical loss." (*Id.*) To support this, Plaintiff solely cites *Studio 417*. *See Studio 417 Inc. v. Cincinnati Ins. Co.*, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020); (Pl.'s Opp'n Br. 14, 16, 19.) The vast majority of cases that have emerged since *Studio 417* have explicitly rejected this this approach. *See, e.g., Zwillo V, Corp. v. Lexington Insur. Co.*, 504 F. Supp. 3d 1034 (W.D. Mo. Dec. 02, 2020); *1 S.A.N.T., Inc. v. Berkshire Hathaway, Inc.*, 2021 WL 147139, at *6–7 (W.D. Pa. Jan. 15, 2021). The Court will not deviate from the recent line of reasoning employed in this circuit and fails to find coverage stemming from Plaintiff's "loss of use" of covered properties.

B. Plaintiff Has Failed to Allege that COVID-19 Has Caused Direct Physical Loss or Damage to Covered Properties.

Plaintiff alternatively contends that their covered restaurants have experienced a covered cause of loss from direct COVID-19 contamination because "Plaintiff alleges that its insured property is at imminent risk of coronavirus contamination, or it may have already been contaminated and that surrounding property has been contaminated." (Pl.'s Opp'n Br. 18-19, Complaint ¶¶ 27, 56-59.) Plaintiff argues that "clear evidence of the coronavirus being present throughout the state, its presence in and around Plaintiff's insured properties, and the severe safety risks associated with allowing individuals to come in[to]" close contact with one another is sufficient to warrant a finding that COVID-19 has damaged the covered properties. (Reply 19, Complaint ¶¶ 58-59.)

In its complaint, however, Plaintiff never offers specific factual allegations about COVID-19 damaging its restaurants or other properties near its restaurants. In fact, "[p]laintiff does not seek any determination whether the Coronavirus is physically in or at the Insured Properties" (Complaint ¶ 70.) Plaintiff instead alleges that its premises are unsafe solely because of the inevitability of individuals being near one another. (Comp. ¶ 60.)

Plaintiff's conclusory allegations, relying on the pervasiveness of COVID-19 throughout New Jersey, are insufficient to trigger coverage under the Business Income, Extra Expense, or Civil Authority Endorsements and survive a 12(b)(6) motion. This is because "[e]ach of the coverage provisions Plaintiff relies on specifically require 'direct physical loss or damage' to trigger the Policy . . . Plaintiff has not alleged any facts that support a showing that its property was physically damaged.". *Boulevard Carroll Entm't Grp., Inc. v. Fireman's Fund Ins. Co.*, 2020 WL 7338081, *2 (D.N.J. Dec. 14, 2020). This Court agrees with the *Boulevard Carroll* Court and fails to find a sufficient factual basis to conclude that its covered properties suffered a loss

caused directly from COVID-19 contamination or, in the case of the Civil Authority Endorsement, to surrounding property.

However, even if Plaintiff properly alleged the existence of COVID-19 contamination at covered properties, this would not be enough to support coverage under the Policy. This is because "the presence of a virus that harms humans but does not physically alter structures does not constitute coverable property loss or damage." *7th Inning Stretch LLC v. Arch Ins. Co.*, 2021 WL 1153147, at *2 (D.N.J. Mar. 26, 2021); *See also Handel v. Allstate Ins. Co.*, 2020 WL 645893, at *3 (E.D. Pa. Nov. 6, 2020) (relying on *Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 235 (3d Cir. 2002)) (noting that physical loss or damage requires "that the functionality of the property 'was nearly eliminated or destroyed' or the 'property was made useless or uninhabitable'".) Plaintiffs' claims, even if properly plead, would still be insufficient.

The Court is sympathetic to the plight of business owners in the wake of the COVID-19 pandemic; however, it will not deviate from the weight of authority in construing identical contract language to "rewrite the contract for the benefit of either party." *Del. Valley Plumbing*, 2021 WL 567994, at *7. The Court, accordingly, grants Defendants' Motion to Dismiss.

IV. CONCLUSION

For the reasons set forth above, Defendants' Motion to Dismiss is granted. The Court will enter an Order consistent with this Memorandum Opinion.

Applicant Details

First Name	**Hadiya**
Last Name	**Williams**
Citizenship Status	**U. S. Citizen**
Email Address	**hnw245@nyu.edu**
Address	**Address** Street **5627 2nd Street** City **Long Island City** State/Territory **New York** Zip **11101** Country **United States**
Contact Phone Number	**5082988450**

Applicant Education

BA/BS From	**University of Massachusetts-Amherst**
Date of BA/BS	**May 2018**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 19, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**New York University Law Review**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**New York**

Prior Judicial Experience

Judicial Internships/Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Hershkoff, Helen
helen.hershkoff@nyu.edu
212-998-6715

Murray, Melissa
melissa.murray@nyu.edu
(212) 998-6440

Archer, Deborah
deborah.archer@nyu.edu
212-998-6528

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Hadiya Williams
5627 Second Street
Long Island City, NY 11101

April 29, 2023

The Honorable Kiyo Matsumoto
United States District Court
Eastern District of New York
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am a litigation associate at Sidley Austin LLP and a graduate of New York University School of Law, where I was an Executive Editor on *Law Review*, a Root-Tilden-Kern Scholar, and a Birnbaum Women's Leadership Network Fellow. I write to apply for a clerkship in your chambers for the 2025-2026 term or any subsequent term.

Enclosed are my transcript from NYU School of Law, two transcripts from the University of Massachusetts Amherst, where I obtained my MPP in 2019 and my BS and BA in 2018, and my writing sample. My recommendations, which will be sent separately, come from NYU Professors Deborah Archer, Helen Hershkoff and Melissa Murray. I was a member of Professor Archer's Civil Rights Clinic in the fall and spring semester of my 2L year. I was a student in Professor Hershkoff's 1L reading group, Public Interest Litigation. I then worked for Professor Hershkoff as a research assistant over the summer of 2020 and during the fall semester of 2L. I worked with Professor Murray as a Fellow in the Birnbaum Women's Leadership Network. I then enrolled in directed research with her to write my Note during the spring of 2L. Below is the contact information for my recommenders:

Professor Archer	deborah.archer@nyu.edu	212-998-6473
Professor Hershkoff	helen.hershkoff@nyu.edu	212-998-6285
Professor Murray	melissa.murray@nyu.edu	212-998-6440

Thank you for your consideration.

Respectfully,

/s/ Hadiya N. Williams

HADIYA N. WILLIAMS

5627 2nd St Long Island City, NY 11101 | (508)298-8450 | hadiya.williams@law.nyu.edu

EDUCATION

Bar Admissions
New York, First Department — June 2022

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY — May 2022
Honors: Executive Editor, *New York University Law Review*
Root-Tilden-Kern Scholar, *Doris C. & Alan J. Freedman Scholarship*
Birnbaum Women's Leadership Network Fellow
Center for Diversity, Inclusion, and Belonging Fellow
Pro Bono Scholar, NYLAG Legal Health
Dean John Sexton Prize, Convocation Award
Activities: Black Allied Law Students Association, Co-Chair
Note: Defining State Police Power Limits in Public Health Crises: *Jacobson*, Abortion, & Religion

UNIVERSITY OF MASSACHUSETTS AMHERST, Amherst, MA — May 2019
Master of Public Policy (MPP), *specialized focus on health policy*

UNIVERSITY OF MASSACHUSETTS AMHERST, Amherst, MA
B.S. in Psychology-Neuroscience and B.A. in Anthropology, *cum laude* — May 2018
Certificate: Culture, Health, and Science
Thesis: *Black Health Inequalities in the United States: Genetics, Healthcare, or Structural Violence?*
Honors: Commonwealth Honors College Scholar with Great Distinction, Multidisciplinary Honors
21st Century Leadership Award Recipient
Activities: Alpha Kappa Alpha Sorority Incorporated, President
Student Government Association, Senator, Social Justice & Empowerment Committee
Study Abroad: Spring 2018 Study Abroad in Cusco, Peru

EXPERIENCE

SIDLEY AUSTIN LLP, New York, NY
Litigation Associate, October 2022—Present
Advise individual and corporate clients in complex litigation, appeals, and regulatory matters in addition to pro bono.

Summer Associate, May 2021—July 2021
Engage in and present legal research and writing on a variety of matters including general litigation, bankruptcy, and pro bono work. Participate in training, workshops, and social events curated by the firm.

NEW YORK LEGAL ASSISTANCE GROUP, New York, NY
Sidley Austin Pro Bono Fellow, September 2022—October 2022
Staff attorney in the public benefits unit, serving clients with need for advanced planning directives, health insurance, and related issues.

Staff Attorney (Part-Time, Temp), June 2022—August 2022, ***Pro Bono Scholar*** February 2022—June 2022
Staff the NYU Langone Hospital clinic in the Legal Health unit providing legal assistance to low-income New Yorkers with serious health problems. Areas of practice include immigration, housing, family law, consumer debt, and public benefits.

PROFESSOR HELEN HERSHKOFF, NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
Research Assistant, June 2020—December 2020
Prepare the annual supplementation to Volume 14 of Federal Practice and Procedure, § 3660.1.

PLANNED PARENTHOOD FEDERATION OF AMERICA, New York, NY
Public Policy Litigation & Law Intern, June 2020—August 2020
Write legal memoranda for litigating attorneys in support of the organization's ongoing and potential litigation challenging restrictions on access to comprehensive reproductive health care, including abortion. Attend virtual depositions via zoom and participated in weekly ligation strategy meetings.

Name:	**Hadiya N Williams**
Print Date:	**03/14/2023**
Student ID:	**N17649979**
Institution ID:	**002785**
Page:	**1 of 1**

New York University
Beginning of School of Law Record

Degrees Awarded

Juris Doctor 05/18/2022
School of Law
Major: Law

Fall 2019

School of Law
Juris Doctor
Major: Law

Lawyering (Year)		LAW-LW 10687	2.5	CR
Instructor:	Elizabeth J Chen			
Criminal Law		LAW-LW 11147	4.0	B+
Instructor:	Issa Kohler-Hausmann			
Procedure		LAW-LW 11650	5.0	B
Instructor:	Geoffrey P Miller			
Contracts		LAW-LW 11672	4.0	B-
Instructor:	Barry E Adler			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2020

School of Law
Juris Doctor
Major: Law

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Due to the COVID-19 pandemic, all spring 2020 NYU School of Law (LAW-LW.) courses were graded on a mandatory CREDIT/FAIL basis.
--

Constitutional Law		LAW-LW 10598	4.0	CR
Instructor:	Daryl J Levinson			
Lawyering (Year)		LAW-LW 10687	2.5	CR
Instructor:	Elizabeth J Chen			
Legislation and the Regulatory State		LAW-LW 10925	4.0	CR
Instructor:	Adam B Cox			
Torts		LAW-LW 11275	4.0	CR
Instructor:	Eleanor M Fox			
1L Reading Group		LAW-LW 12339	0.0	CR
Topic:	Perspectives on Public Interes			
Instructor:	Helen Hershkoff			

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2020

School of Law
Juris Doctor
Major: Law

Colloquium on Constitutional Theory		LAW-LW 10031	2.0	A
Instructor:	Daryl J Levinson Trevor W Morrison			
Civil Rights Clinic Seminar		LAW-LW 10559	4.0	A-
Instructor:	Deborah Archer Johanna E Miller			
Civil Rights Clinic		LAW-LW 10627	3.0	A-
Instructor:	Deborah Archer Johanna E Miller			
Evidence		LAW-LW 11607	4.0	A
Instructor:	Daniel J Capra			
Teaching Assistant		LAW-LW 11608	2.0	CR
Instructor:	Elizabeth J Chen			

	AHRS	EHRS
Current	15.0	15.0
Cumulative	45.0	45.0

Spring 2021

School of Law
Juris Doctor
Major: Law

Civil Rights Clinic Seminar		LAW-LW 10559	4.0	A-
Instructor:	Deborah Archer Johanna E Miller			
Civil Rights Clinic		LAW-LW 10627	3.0	A-
Instructor:	Deborah Archer Johanna E Miller			
Directed Research Option A		LAW-LW 10737	2.0	A
Instructor:	Melissa E Murray			
Professional Responsibility and the Regulation of Lawyers		LAW-LW 11479	3.0	A
Instructor:	Barbara Gillers			
Spanish for Lawyers		LAW-LW 12316	2.0	CR
Not applicable to current program				
Instructor:	Mateo Guerrero-Tabares			
Not applicable to current program				

	AHRS	EHRS
Current	14.0	12.0
Cumulative	59.0	57.0

Fall 2021

School of Law
Juris Doctor
Major: Law

Family Law		LAW-LW 10729	4.0	B
Instructor:	Melissa E Murray			
Law Review		LAW-LW 11187	2.0	CR
Federal Courts and the Federal System		LAW-LW 11722	4.0	B
Instructor:	Trevor W Morrison			
Property		LAW-LW 11783	4.0	B+
Instructor:	Daniel Hulsebosch			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	73.0	71.0

Spring 2022

School of Law
Juris Doctor
Major: Law

PBSP Law and Power Externship		LAW-LW 12651	10.0	CR
Instructor:	Paula Galowitz			
PBSP Law and Power Externship Seminar		LAW-LW 12763	2.0	A
Instructor:	Paula Galowitz			
PBSP Law and Power Externship Seminar		LAW-LW 12763	2.0	A
Instructor:	Paula Galowitz			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	87.0	85.0

Staff Editor - Law Review 2020-2021
Executive Editor - Law Review 2021-2022

End of School of Law Record

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines
The following guidelines, adopted in Fall 2008, represent NYU School of Law's current guidelines for the distribution of grades in a single course. Note that JD and LLM students take classes together and the entire class is graded on the same scale.

A+ = 0-2%	A = 7-13%	A- = 16-24%
B+ = 22-30%	B = Remainder	B- = 0-8% for 1L JD students; 4-11% for all other students
C/D/F = 0-5%	CR = Credit	IP = In Progress
EXC = Excused	FAB = Fail/Absence	FX = Failure for cheating

*** = Grade not yet submitted by faculty member
Maximum for A tier = 31%; Maximum grades above B = 57%

The guidelines for first-year JD courses are mandatory and binding on faculty members. In all other cases, they are advisory but strongly encouraged. These guidelines do not apply to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students taking the course for a letter grade.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, or to LLM students.

Missing Grades
A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more

than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process for all NYU School of Law students is highly selective and seeks to enroll individuals of exceptional ability. The Committee on Admissions selects those candidates it considers to have the very strongest combination of qualifications and the very greatest potential to contribute to the NYU School of Law community and the legal profession. The Committee bases its decisions on intellectual potential, academic achievement, character, community involvement, and work experience. For the Class entering in Fall 2020 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 172/167 and 3.9/3.7. Because of the breadth of the backgrounds of LLM students and the fact that foreign-trained LLM students do not take the LSAT, their admission is based on their prior legal academic performance together with the other criteria described above.

New York University
A private university in the public service

School of Law
40 Washington Square South, Room 308C
New York, NY 10012-1099

Helen Hershkoff
Herbert M. and Svetlana Wachtell Professor of Constitutional Law and Civil Liberties
Co-Director, The Arthur Garfield Hays Civil Liberties Program

Telephone: (212) 998-6285
Fax: (212) 995-4760
Email: helen.hershkoff@nyu.edu

March 29, 2023

Dear Judge:

I am writing to recommend Hadiya Williams, NYU Law 2022, for a judicial clerkship with you. I do so with great enthusiasm. Hadiya served as my Research Assistant during summer 2020, and continued into the 2021 academic year. At graduation, she was honored with the Dean John Sexton Prize; as a student, she was selected to be a Root-Tilden-Kern Scholar, a Birnbaum Women's Leadership Network Fellow, and a Center for Diversity, Inclusion and Belonging Fellow. Hadiya currently works as an associate at Sidley Austin, on teams advising and representing individual and corporate clients in complex litigation, appeals, and regulatory matters. She also has taken on a number pro bono matters, including direct services work on adoption and asylum proceedings, and impact litigation research for large nonprofits. I have confidence that she would be an excellent judicial clerk.

I met Hadiya in spring 2020, when she was a student in my Reading Group on public interest litigation. A Reading Group is an optional, ungraded seminar that NYU offers to first-year students. The goal is to encourage high level discussion on issues of shared concern, and for faculty and students to meet in a setting that is less distant than that of the rest of the 1L curriculum (I teach Civil Procedure). Readers in my group are expected to choose readings from among titles I suggest, to work in teams to plan a seminar discussion, to write a "framing memo" for the group, and to convene the discussion (one of my specific pedagogic goals is to train the students for the kinds of office meetings they are likely to encounter in law practice or in some other professional setting). Hadiya and her partner chose to discuss an article that raised a number of important strategic issues: how to "frame" legal arguments to convince courts and the public that a claim seeking to change the law is legitimate; the structural advantages of litigation versus other strategies to motivate legal and social change; and the effect of judicial decisions on social movements. Hadiya's co-authored framing memo was excellent. It asked the students to engage with different hypotheses concerning the relationship between law and social change (e.g., reflectionist, cause-acceptance, and clean-up) and to think realistically about institutions and roles. She also convened a lively and inclusive discussion that permitted the voicing of alternative points of view, did not hide disagreement, and was collegial and informed.

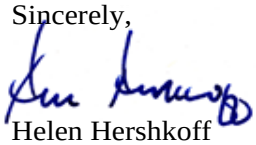
While in the Reading Group, Hadiya applied to be a part-time summer Research Assistant to help prepare annual supplementation to Volume 14 of Wright and Miller's Federal Practice and Procedure. This volume covers the various doctrines and rules pertaining to the United States as a party and sovereign immunity. After an interview and a review of her transcript, I was happy to hire Hadiya. Specifically, Hadiya worked on § 3660.1, "Recovery of Attorney's Fees," which covers the statutes and common law rules governing the liability of the United States for the payment of attorney's fees. Her assignment required identifying all district and circuit cases from the last year on the topic, including developments under the Equal Access to Justice Act and common law doctrines. I review my RA's work weekly, reading the cases and occasionally redoing the Westlaw searches to confirm that relevant cases are being identified. I consistently found Hadiya's work to be thorough, careful, and accurate. She showed good judgment in summarizing the cases, accepting feedback, and meeting deadlines. Above all, her work was precise, accurate, and clearly presented. In particular, she impressed me with her professionalism, enthusiasm, and ability to do high quality research on a tight timetable.

Based on these two experiences, I have every confidence that Hadiya has the skills needed to be an excellent judicial clerk. She was selected to be a staff editor of the Law Review and served as an Executive Editor, also working on the selection process for articles. I add that she also contributed to the Law School in a number of other, important ways, and these activities highlight her skills, interests, and energy. As a first-year law student, she served as the 1L Representative for the Black Allied Law Students Association and served as the Co-Chair during 2L. As a 2L, she assumed a leadership role in the Public Interest Law Students Association, working to ensure that every event adequately considered diversity and inclusion.

I think Hadiya would be an excellent judicial clerk. If you have questions or would like additional information, please do not hesitate to contact me.

Thanks so much for your consideration.

Sincerely,



Helen Hershkoff

NYU | LAW

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March 27, 2023

Dear Judge:

Hadiya Williams, a 2022 graduate of NYU Law, has asked me to write this letter of recommendation in support of her application to be a clerk in your chambers. I am delighted to do so. I had the pleasure of knowing Hadiya throughout her time at NYU, first as a fellow in the Birnbaum Women's Leadership Network, and more recently through her directed research project, which she completed under my supervision. As a former law clerk to two federal judges (Justice Sonia Sotomayor and Judge Stefan R. Underhill), I am confident that she will be a marvelous addition to your chambers.

I first came to know Hadiya when she was selected as a Birnbaum Women's Leadership Network Fellow. Each year, we select twelve leadership fellows through a competitive process that gauges past leadership experience and leadership potential. Beginning in the spring semester of the first year, those selected for the program undertake intensive leadership training that continues throughout their time at NYU Law. From the start, Hadiya was a standout in the group. Even as we were culling finalists from the application pool, we knew that she had to be part of the group. Her maturity, grace, and intelligence jumped off the page. We were not disappointed. During the first leadership intensive, she was completely engaged in the program, asking thoughtful, nuanced questions that helped to advance our discussions.

Not surprisingly, she immediately made her mark as a leader at NYU Law. In her first semester, she ran for a position as the 1L Representative for the Black Allied Law Students Association (BALSA). I happened to attend the meeting at which the election was conducted. I was not surprised when Hadiya was elected by a wide margin. Her speech made clear how prepared and professional she was—and suggested how she would operate as an effective liaison between the 1L class and the wider organization.

As a 2L, Hadiya was elected as a co-chair of BALSA, leading the organization at an especially challenging time. In these various leadership roles, Hadiya acquitted herself well. She earned the respect of her peers with her diligence and reliable service. She was determined to do good work and held herself to a high standard. To this end, I was especially impressed when, disappointed with her first semester grades, Hadiya took it upon herself to approach her professors and mentors for guidance on how to improve her performance. She then took that advice and translated it into effective exam preparation and improved results.

As a student, Hadiya also dedicated herself to improving the broader NYU Law community. In addition to leading BALSA through a tumultuous and virtual academic year, she served as an active member of the Root-Tilden-Kern program's Diversity Committee, providing important mentorship to two classes of Root-Tilden-Kern scholars.

I should also note that Hadiya served as a research assistant for one of my colleagues and as a teaching assistant for the Lawyering Program, NYU Law's legal skills program for 1L students. These experiences, coupled with her work on the *New York University Law Review*, allowed her to hone her legal research and writing skills. Relatedly, in her second year, she worked with me on a directed research project that considered federal appellate courts' differing responses to COVID restrictions on religious institutions and reproductive rights providers. There, as elsewhere, Hadiya's diligence and drive were impressive.

Since graduating from NYU Law, Hadiya has done an impressive array of work with the New York Legal Assistance Group (NYLAG). For example, in the summer following graduation, she worked part-time as a staff attorney at NYLAG's LegalHealth Unit, where she staffed the NYU Langone clinic. In that capacity, she conducted intake interviews with clients seeking legal assistance for housing, immigration, advanced planning, holocaust survivor benefits, and other related issues. When the summer ended, she continued at NYLAG—this time as a Sidley Austin Pro Bono Scholar—in the public benefits unit. There, she drafted wills and other advanced planning documents, and assisted clients in securing a range of public benefits. At the end of October 2022, she formally joined Sidley Austin as a litigation associate. She is currently staffed on three trial teams, while maintaining an active pro bono practice that makes use of her public benefits training.

In sum, I am delighted to recommend Hadiya as a judicial clerk. She is a quick learner and manages to find joy and excitement in her work, no matter the assignment. Moreover, she has a warm and lovely personality. She will fit in easily in any work environment. I hope you will give her application close consideration as you make your personnel selections. If I can be of further assistance, please feel free to contact me at melissa.murray@law.nyu.edu or via telephone at (510) 502-1788.

Sincerely Yours,

Melissa Murray
Frederick I. and Grace Stokes Professor of Law

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April 28, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am writing to offer my highest recommendation of Hadiya Williams for a clerkship in your chambers. I have come to know Hadiya quite well through her work in the Civil Rights Clinic I teach. Hadiya is smart, engaged, and thoughtful. She is a person of remarkable intelligence, broad intellectual curiosity, meticulous organization, and superior writing ability. She has consistently impressed me as a person of extraordinary integrity and strength of character. Hadiya has my unqualified support.

The Civil Rights Clinic provides students with the opportunity to work on a wide range of civil rights and social justice matters through direct client representation, appellate advocacy, and the development of advocacy campaigns. Selection is highly competitive, and Hadiya was one of only eight students selected for the Clinic from a pool of over one hundred applicants. From the first class, Hadiya has been a star. Her work has been creative, and she has demonstrated compassion and profound empathy for her clients and their needs. She has excelled in a wide range of work, from representing an incarcerated man seeking compassionate release during the pandemic, to helping craft a nationwide campaign to challenge racially discriminatory housing policies. In all her work, Hadiya worked tirelessly to present the strongest legal case on behalf of her clients.

I have been thrilled with all her work. She takes direction and suggestions easily and generously shares her perspective with her Clinic colleagues. Substantively, she has demonstrated that she is an extremely quick study, mastering complex legal and policy issues in a short matter of time. The quality of Hadiya's work, the relevance and insightfulness of her ideas, and her passion for equality have truly impressed me.

Hadiya was also a critical contributor to our discussions in the Clinic seminar. She is always willing to challenge and be challenged by her colleagues. She exhibits an essential characteristic for a law clerk: she is never afraid to express an opinion that she knew differed from mine.

On a personal level, Hadiya has consistently demonstrated the kind of sensitivity and even temperament that is critical to work as a law clerk. In her interactions with classmates, faculty, and staff, she is always considerate and a team player. Being kind, generous, and helpful is simply second nature to her. She is also an exceptional leader, serving as Co Chair of the Black and Allied Law Students Association and leading that group through the challenges of a nationwide reckoning on racial justice.

NYU attracts remarkable students. Amid this competitive group, Hadiya stands out because she has it all: sharp intellect; boldness and diligence in the face of challenges; and incredible leadership skills. I have every confidence that Hadiya would be an invaluable asset to your chambers, and it is with tremendous enthusiasm that I recommend her to you. If I can provide any further information, please let me know.

Sincerely,

Deborah N. Archer
Professor of Clinical Law

H.Williams Writing Sample Cover Page

The following pages contain my writing sample, which is an excerpt from my Note, entitled "Defining State Police Power Limits in Public Health Crises: *Jacobson*, Religion, and Abortion." The Introduction and Part I are omitted, but a brief synopsis of *Jacobson,* the abstract, and table of contents are included below for context. Lastly, this Note was written prior the Supreme Court's decision in *Dobbs*, and considers fundamental rights accordingly. Thank you.

Jacobson: *Jacobson v. Massachusetts* is an over-a-century-old Supreme Court case concerning a mandatory vaccination law.[1] In an attempt to control smallpox outbreaks, Cambridge, Massachusetts required all residents to be vaccinated against smallpox.[2] Plaintiff Jacobson refused to comply and was subsequently fined, as required by the city ordinance.[3] He challenged the law, arguing that the clauses of the Fourteenth Amendment provide that "no state shall make or enforce any law abridging the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."[4]

Plaintiff Jacobson claimed that the required vaccination violated his rights under the Fourteenth Amendment. The Supreme Court disagreed,[5] holding that "the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."[6] As importantly, the *Jacobson* Court confirmed the state's broad authority to exercise its police power so long as the state's exercise of its power had a "real or substantial relation to public health" or was not "beyond all question, a plain, palpable invasion of rights secured by the fundamental law."[7] Despite "or" language in the *Jacobson* standard, modern courts often consider the two prongs together.[8]

[1] Jacobson v. Massachusetts, 197 U.S. 11 (1905).
[2] *Jacobson*, 197 U.S. at 12-13.
[3] *Id.* at 13.
[4] *Id.* at 14.
[5] *Id.* at 20-30 ("It is not . . . true that the power of the public to guard itself against imminent danger depends in every case involving the control of one's body upon his willingness to submit to reasonable regulations established by the constituted authorities, under the sanction of the state, for the purpose of protecting the public collectively against such danger.").
[6] *Id.* at 25.
[7] *Id.* at 31 ("If a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.").
[8] *See, e.g.*, Robinson v. Att'y Gen., 957 F.3d 1171, 1180 (11th Cir. 2020) (finding that the executive order "imposed a 'plain, palpable invasion of rights,' yet had 'no real or substantial relation' to the state's goals" (citation omitted)); *In re* Abbott, 954 F.3d 772, 784 (5th Cir. 2020) ("[W]hen faced with [] society-threatening epidemic[s], a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some 'real or substantial relation' to the public health crisis *and* are not 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'" (emphasis added) (citation omitted)).

Abstract: *In the midst of the COVID-19 global pandemic, state governors issued executive orders across the nation, exercising their police power to protect the public health. Those orders, among other things, curtailed access to abortion and the free exercise of religion; two fundamental rights derived from our Constitution. Litigants challenged these orders in court and various federal appellate courts relied on* Jacobson v. Massachusetts*, a 1905 Supreme Court case upholding a mandatory vaccination law, to guide their decisions. However, the appellate courts split on their interpretation of* Jacobson*, with some upholding the executive orders while others invalidated them. Eventually, some of these challenges percolated up to the Supreme Court, where they were ultimately resolved through an expansive understanding of religious liberty—and with very little deference to* Jacobson*.*

This Note considers Jacobson*'s application in the COVID-19 fundamental rights cases. As it explains,* Jacobson*, and its solicitude for state police power, was applied differently in different contexts. Generally, courts were more likely to apply* Jacobson*'s logic—and uphold state COVID-19 restrictions, where abortion access was implicated. However, where lockdown orders implicated religious liberty, courts were less likely to defer to* Jacobson*. As this Note argues, despite the temporary impositions of a pandemic, the inconsistent and incoherent application of* Jacobson *should be rectified. These uneven decisions create lasting precedent and highlight greater issues present in the judiciary and discussion of fundamental rights. This note concludes by presenting a new legal standard that attempts to balance* Jacobson's *deference to state governments in public health crises alongside our modern-day standards of judicial review, protecting both the separation of powers and constitutional rights.*

H.Williams Writing Sample

II. (DIS)TRUSTING THE COURTS TO PROTECT FUNDAMENTAL RIGHTS

While it is true that the COVID-19 pandemic will not last forever, the precedents that emerge from this period, even if they emerge from the emergency docket, will survive. Indeed, the impact of these emergency decisions will extend far beyond this time. Additionally, these cases reflect larger debates happening in the courts about the way in which we should attend to particular rights. A microcosm of the larger debate, these COVID-19 abortion access and religious liberty cases play out in a way that seems especially sharp because, in light of the pandemic, there are life or death stakes. These cases reveal the broader conflict over the nature and scope of protections for fundamental rights, and indeed, what is recognized as a fundamental right.

A. The Precedential Shadow Docket

While only a few of the COVID-19 fundamental rights cases have reached the Supreme Court, those that have (and those that might) will survive the pandemic. These cases, which appeal to the Court for emergency relief, are decided without full briefing and oral arguments.[1] And when the decision is made, there is hardly a written opinion or an understanding of the justices' stances.[2] That suggests that cases concerning constitutional, fundamental rights are being decided on paper, are used uncritically by lower courts, and are incoherent as to what they suggest as a standard for determining state authority in the face of fundamental rights. The cases

[1] William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U J.L. & LIBERTY 1, 3 (2015).
[2] *See, e.g.*, *id.* at 3; Samantha O'Connell, *Supreme Court "Shadow Docket" Under Review by U.S. House of Representatives*, ABA Journal: Sup. Ct. (April 14, 2021), https://www.americanbar.org/groups/committees/death_penalty_representation/publications/project_blog/scotus-shadow-docket-under-review-by-house-reps ("These shadow docket orders often do not include information about how each Justice voted or why the majority came to a certain conclusion, potentially leaving lower courts in the dark about how to apply Supreme Court precedent moving forward."); Adam Liptak, *Missing From Supreme Court's Election Cases: Reasons for Its Rulings,* N.Y. TIMES (Oct. 26, 2020) ("Most of the orders, issued on what scholars call the court's "shadow docket," did not bother to supply even a whisper of reasoning.").

are on the shadow docket, which "refers to the thousands of decisions the Supreme Court hands down each term that 'defy its normal procedural regularity'. . . [lacking] public deliberation and transparency."[3]

Now, more than ever, there are many significant rulings emerging from the shadow docket. The space that full briefing, oral arguments, and detailed opinions once occupied is empty, leaving the lower courts to blindly fill in the gaps.[4] In many cases, shadow-docket rulings have meant life or death, and they similarly threaten fundamental rights.[5]

Moreover, these cases, which do not get the same treatment as merit cases, may end up being precedential.[6] In fact, we have begun to see the courts reprimand lower courts for failing to follow shadow docket decisions.[7] For this reason, it is imperative that we examine this moment, even if it is extraordinary in some degree, because these cases will have a shelf life that lasts beyond the pandemic. We must consider the long-term impact of these ostensibly emergency decisions.

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[3] O'Connell, *supra* note 2; *see also* Mark Walsh, *The Supreme Court's 'Shadow Docket' Is Drawing Increasing Scrutiny*, ABA J.: SUP. CT. REPORT (Aug. 20, 2020 9:20 AM), https://www.abajournal.com/web/article/scotus-shadow-docket-draws-increasing-scrutiny. The term "shadow docket" was first coined by William Baude in 2015. William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U J.L. & LIBERTY 1 (2015).

[4] Lawrence Hurley et al., *The 'Shadow Docket': How the U.S. Supreme Court Quietly Dispatches Key Rulings,* REUTERS (Mar. 23, 2021, 6:29 AM), https://www.reuters.com/article/legal-us-usa-court-shadow-video/the-shadow-docket-how-the-u-s-supreme-court-quietly-dispatches-key-rulings-idUSKBN2BF16Q (explaining that shadow docket cases arrive with "no public discussion and no guidance to lower-court judges on how to analyze similar cases).

[5] *See* O'Connell, *supra* note 2 (highlighting that in 2020, "the Supreme Court repeatedly vacated stays and injunctions put in place by lower courts via unsigned orders . . . clearing the way for [] executions. . . ."); Walsh, *supra* note 3 (noting that in the past term, shadow docket actions predominately concerned COVID-19, election issues, and Trump administration policies).

[6] *See, e.g.*, Stephen I. Vladeck, *How the Supreme Court Is Quietly Enabling Trump*, N.Y. TIMES (June 17, 2020), https://www.nytimes.com/2020/06/17/opinion/supreme-courts-trump-relief.html (noting that "emergency relief from the court has become a de facto vindication" of immigration programs).

[7] *See* Tandon v. Newsom, 141 S. Ct. 1294, 1297 (2021) ("This is the fifth time the Court has summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise."); *The Supreme Court's Shadow Docket*, WE THE PEOPLE PODCAST (Oct. 7, 2021), https://constitutioncenter.org/interactive-constitution/podcast/the-supreme-courts-shadow-docket ("On the shadow docket in the Tandon case, a case about California's restrictions on in home gatherings that the court decided on the shadow docket in April, the court went out of its way to chastise the ninth circuit for not following four prior decisions the court had issued in California COVID cases, none of which had a majority opinion, all of which were orders.").

H.Williams Writing Sample

Despite a dearth of literature on the topic, some legal theorists have begun to consider the shadow docket's role in creating precedent. Judge Trevor McFadden and Vetan Kapoor argue that there are three categories which represent the shadow docket's precedential force on lower courts: little precedential value (e.g., denial of stay), persuasive authority (e.g., decisions with dissents and/or concurrences), and deferential authority (decisions that express the majority view).[8]

The fundamental rights COVID-19 cases have reached the latter two categories. In *South Bay*, *Calvary Church*, and *Roman Catholic*, concurrences and dissents were issued, with the Court's composition changing significantly between the first two decisions and the last.[9] This provided insight into the justices' thinking, and it is reasonable to assume it could be persuasive in the lower courts. In *Tandon*, the majority issued an opinion and three justices dissented. This case, concerning the fundamental right to free exercise of religion, was decided on the shadow docket, and created new law.[10]

A lack of the "high standards of procedural regularity" imposed upon shadow docket cases highlights tension between the courts in and public.[11] Shadow docket cases lack transparency.[12] As the cases are decided, there is little insight as to *how* they were decided and

[8] J. Trevor McFadden & Vetan Kapoor, *Symposium: The Precedential Effects of Shadow Docket Stays*, SCOTUSBLOG (Oct. 28, 2020, 9:18 AM), https://www.scotusblog.com/2020/10/symposium-the-precedential-effects-of-shadow-docket-stays/.
[9] South Bay Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020); Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020); Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020).
[10] Stephen I. Vladeck, *The Supreme Court Is Making New Law in the Shadows*, N.Y. TIMES (Apr. 15, 2021), https://www.nytimes.com/2021/04/15/opinion/supreme-court-religion-orders.html ("[In *Tandon*], justices upended their own First Amendment jurisprudence in the religion sphere, making new law in a way their precedents at least used to say they couldn't.").
[11] *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U J.L. & LIBERTY 1, 4 (2015). ("[T]he Court's non-merit orders do not always live up to the high standards of procedural regularity set by its merits cases. . . .").
[12] Walsh, *supra* note 3 ("Only when four justices dissent on a stay, for example, does the public know that the vote was 5-4.").

by *whom*.[13] This is especially problematic for the courts because, outside of the pandemic, they are already faced with conflict between government authority and fundamental rights on a larger scale.[14] The opacity of the decision-making process on the shadow docket has led some to doubt the courts even further.[15] As Professor Stephen Vladeck identifies it, "the [C]ourt's behavior in these cases gives at least the appearance of undue procedural favoritism toward the government as a litigant."[16] Justice Sotomayor further warns that this disparate treatment "erodes the fair and balanced decision making process that this Court must strive to protect."[17] This erosion can appear polarized, fostering doubt in the public about the fairness of our courts.[18] It has been attributed by some to a conservative takeover of the court, advancing an agenda without the protections of oral arguments.[19]

B. Microcosmic Reflections

As COVID-19 executive orders ban abortions and curtail religious freedom, the chance that their litigation reaches the Supreme Court—and perhaps even more frighteningly, the

[13] *Id.* ("The public understands little about how the court handles the shadow docket because those matters aren't argued, the decisions aren't signed, and the majority's reasoning is rarely offered.").
[14] *See infra* Part II.C.
[15] Lawrence Hurley et al., *supra* note 4 ("It's hard for the public to know what is going on, and it's hard for the public to trust that the court is doing its best work. . .").
[16] Vladeck, *supra* note 6.
[17] Wolf v. Cook County, 148 S. Ct. 681 (2020) (Sotomayor, J., dissenting).
[18] *See* Walsh, *supra* note 3 ("The shadow docket looks to be a heck of a lot more polarized than the more visible work of the court. . ."); Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV 123, 127 ("[S]uch a shift gives at least the appearance that the Court is showing favoritism not only for the federal government as a party, but for a specific political party when it's in control of the federal government.").
[19] *See* Vladeck, *supra* note 6 ("Especially when that disparity seems to repeatedly favor conservative policies over progressive ones, it gives at least the appearance that the court is bending over backward to accommodate a particular political agenda — a message that, now more than ever, all of the justices should be ill inclined to send."); O'Connell, *supra* note 2 (explaining that the shadow docket during the Trump administration demonstrated increased polarization).

shadow docket—probes us to consider the tension between what the American public views as a fundamental right[20] compared to how the Court considers fundamental rights.

In recent years, as Trump nominated justices to the Supreme Court, the public began to fear for the future of *Roe v. Wade*—and rightly so; Trump, in his presidential debate, promised to nominate justices who would overrule the landmark ruling which legalized abortion.[21] Following the death of Justice Ruth Bader Ginsburg, a defender of the fundamental right to abortion, Trump nominated his third conservative justice, Justice Amy Coney Barrett, who many feared would solidify the Court's anti-choice majority.[22] Furthermore, concern for the future of the right to abortion has intensified with *Dobbs v. Jackson Women's Health*, a case concerning the constitutionality of a state law prohibiting abortions after the fifteenth week of pregnancy, currently before the Court.[23]

With a Supreme Court that is more conservative than it has been in decades,[24] our current laws concerning religion and abortion may be subject to drastic changes.[25] The COVID-19

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[20] *U.S. Public Continues to Favor Legal Abortion, Oppose Overturning Roe v. Wade*, PEW RSCH. CTR. (Aug. 29, 2019), https://www.pewresearch.org/politics/2019/08/29/u-s-public-continues-to-favor-legal-abortion-oppose-overturning-roe-v-wade (concluding that most Americans think abortion should be legal and oppose overturning *Roe v. Wade*).

[21] Dan Mangan, *Trump: I'll Appoint Supreme Court Justices to Overturn* Roe v. Wade *Abortion Case*, CNBC: ELECTIONS (Oct. 19, 2016, 9:31 PM), https://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html.

[22] *See, e.g.*, Leah Litman & Melissa Murray, *Shifting from A 5-4 to a 6-3 Supreme Court Majority Could Be Seismic*, WASH. POST (Sept. 25, 2020, 12:13 PM), https://www.washingtonpost.com/outlook/trump-ginsburg-conservative-supreme-court-majority/2020/09/25/17920cd4-fe85-11ea-b555-4d71a9254f4b_story.html.

[23] Dobbs v. Jackson Women's Health, 141 S. Ct. 2619 (2021); *see also* Mark J. Stern, *During Arguments Over the Fate of* Roe*, Kavanaugh and Barrett Finally Showed Their Cards*, SLATE: JURISPRUDENCE (Dec. 1, 2021), https://slate.com/news-and-politics/2021/12/dobbs-supreme-court-abortion-kavanaugh-barrett.html ("During oral arguments on Wednesday in Dobbs v. Jackson Women's Health Organization, five Republican-appointed justices made it abundantly clear that they are prepared to abolish the constitutional right to abortion established nearly 50 years ago in Roe v. Wade.").

[24] Amelia Thomson-DeVeaux & Laura Bronner, *How A Conservative 6-3 Majority Would Reshape the Supreme Court*, FIVETHIRTYEIGHT (Sept. 28, 2020, 6:00 AM), https://fivethirtyeight.com/features/how-a-conservative-6-3-majority-would-reshape-the-supreme-court (noting that the Supreme Court is the most conservative it has been in seventy years upon confirmation of Justice Amy Coney Barrett).

[25] Nina Totenberg, *Religion, Abortion, Guns and Race. Just the Start of a New Supreme Court Menu*, NPR (Dec. 29, 2020, 5:07 AM), https://www.npr.org/2020/12/29/950654338/religion-abortion-guns-and-race-just-the-start-of-a-

litigations reflect larger debates happening at the Court about the ways in which we should attend to particular rights. Indeed, these pandemic cases represent a microcosm of the larger conflict.

The conservative Supreme Court tends to look favorably on the right to free exercise of religion,[26] and the COVID-19 shadow docket emphasizes this point.[27] Indeed, the Court holds a solid conservative majority in religious liberty cases.[28] The Court's stance may be in line with the public's stance on the important of religious liberty.[29] Religious liberty is important to the American public: a recent study found that about eighty percent of Americans think of religious freedom issues as important to them and thirty-five percent believe their religious freedom is threatened.[30]

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new-supreme-court-menu ("On religion [and] abortion . . . there is a solid majority to change the law and . . . move the whip quick . . . .").

[26] *See* Adam Liptak, *An Extraordinary Winning Streak for Religion at the Supreme Court*, N.Y. TIMES (Apr. 5, 2021), https://www.nytimes.com/2021/04/05/us/politics/supreme-court-religion.html ("The five most pro-religion justices all sit on the current court. . . ."); *see also* Zalman Rothschild, *Free Exercise Partisanship*, CORNELL L. REV. (forthcoming, 2022) ("Free exercises cases are no longer controversial and recent judicial decision-making in free exercise cases now tracks political affiliation to a significant degree.").

[27] John Fritze, *Supreme Court Leaves Major Conservative Cases Waiting in the Wings, from Abortion to Guns*, USA TODAY (Apr. 11, 2021, 5:00 AM), https://www.usatoday.com/in-depth/news/politics/2021/04/11/supreme-court-sitting-abortion-gay-rights-controversies-now/4759592001/ (noting that during the pandemic, the Supreme Court has "sided with churches and synagogues" challenging restrictions); *see also* Zalman Rothschild, *Free Exercise Partisanship*, CORNELL L. REV. (forthcoming, 2022), ("[W]hen the pandemic struck, resulting in widespread lockdown of religious house of worship, the unprecedented number of constitutional free exercise cases brought in such a condensed span of time force [] partisanship into sharp relief.").

[28] Totenberg, *supra* note 25. *Race. Just the Start of a New Supreme Court Menu*, NPR (Dec. 29, 2020, 5:07 AM), https://www.npr.org/2020/12/29/950654338/religion-abortion-guns-and-race-just-the-start-of-a-new-supreme-court-menu.

[29] *See, e.g.*, Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 68 (2020) ("But even in a pandemic, the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty."); Tandon v. Newsom 141 S. Ct. 1294, 1297 (2021) ("[Plaintiffs] are irreparably harmed by the loss of free exercise rights 'for even minimal periods of time.'") (internal citations omitted); *see also* Micah Schwartzman & Nelson Tebbe, *Establishment Clause Appeasement*, 2019 SUP. CT. REV. 271, 295-96 (2020) ("Historically, the Court was generally skeptical of exemptions . . . [but] there have been significant changes in recent years, suggesting an inversion of the doctrine. Where the Court had previously denied exemptions and limited those that harmed third parties, it has now become more solicitous of religious accommodations.").

[30] Elana Schor & Hannah Fingerhut, *Religious Freedom in America: Popular and Polarizing*, ASSOCIATED PRESS (Aug. 5, 2020), https://apnews.com/article/donald-trump-religion-u-s-news-virus-outbreak-reinventing-faith.

The fundamental right to religious freedom finds support in both the Court and the public, and COVID-19 litigation reflects this. The COVID-19 ligation regarding abortion access also reflects broader ideas about the fundamental right. However, where religious liberty as a fundamental right finds support from both the public and the courts, the right to abortion encounters deep tension and conflict. In fact, experts warn that with the current Court, despite the protection of religious liberty, a wider range of abortion restrictions may be forthcoming.[31]

C. The Anti-Totalitarian Argument for Fundamental Rights

Amid concerns that abortion is being cast as a lesser right while religious liberty is cast as a predominant right, it is important to evaluate what and how we determine fundamental rights.[32] It is a mistake to base these rights on their explicitness in the Constitution. Indeed, religious liberty is explicitly set forth in the First Amendment,[33] while the right to abortion is nestled within the Fourteenth Amendment's right to privacy.[34] Nonetheless, each is a fundamental right that ought to be protected by the Court.

Alongside abortion, there are many constitutional rights that are fundamental, but are not explicitly written in the Constitution. Such rights include marriage[35] and family relationships,[36]

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[31] Thomson-DeVeaux & Bronner, *supra* note 24 (referencing political scientist Tom Clark's belief that the Court will "permit Republican-controlled states to erode abortion access much more rapidly).

[32] Leah Litman, *Supreme Court Birth Control Ruling Shows How Civil Rights and Abortion Cases Will Be Limited*, NBC NEWS: THINK (July 8, 2020), https://www.nbcnews.com/think/opinion/supreme-court-birth-control-ruling-shows-how-civil-rights-abortion-ncna1233196 ("In the hands of this court, it is not clear where religious exemptions will end and women's health will begin.").

[33] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .").

[34] Roe v. Wade, 410 U.S. 113, 152 (1973) (finding that the right to privacy can be found within the Fourteenth Amendment's concept of personal liberty and restrictions upon the state); *cf*. Planned Parenthood v. Casey, 505 U.S. 833, 979 (arguing that the Constitution does not require states to permit abortion as it "says absolutely nothing about it") (J. Scalia, dissenting).

[35] Loving v. Virginia, 388 U.S. 1, 12 (1967) ("Marriage is one of the 'basic civil rights of man' . . . ." (internal citation omitted)).

[36] Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality); Smith v. Org. of Foster Fams. 431 U.S. 816 (1977); Obergefell v. Hodges, 576 U.S. 644 (2015).

among others.[37] There are also many principles upon which we rely on a regular basis, such as that of executive privilege, which are not explicitly delineated in the Constitution.[38] These instances demonstrate that considering the Constitution as the beginning and end of the discussion on fundamental rights is flawed thinking. Perhaps we should, instead, consider a shared purpose between the fundamental rights which have taken the forefront in the Court's recent docket. In fact, there is an argument to be made that religion and abortion serve similar purposes in a democratic republic.

Constitutional scholars consider that religion is specifically denominated in the Constitution because it provides additional sources of authority to people beyond the authority of the state.[39] That is to say, the religion clauses are so well protected because they serve democracy by providing alternative sources of authority. This enables citizens to be more critical of government and recognize when government goes too far,[40] which is consistent with idea of the Constitution as a document that limits government.[41] Individuals must be trained to recognize when the state goes too far and is being tyrannical, and one of the ways they can be attuned is by having other sources of authority that they hold dear, like religion.[42] Self-determined religion necessarily limits state power.[43]

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[37] *See, e.g.*, *Amendment IX – Non-Enumerated Rights*, USLEGAL, https://system.uslegal.com/u-s-constitution/the-ninth-amendment (last visited Dec. 1, 2021) (listing non-enumerated rights recognized by Supreme Court).
[38] *Art II. S.2. C3.2.3 Executive Privilege: Overview,* CONSTITUTION ANNOTATED (last visited Apr. 15, 2021), https://constitution.congress.gov/browse/essay/artII_S2_C3_2_3 (noting that the Constitution does not expressly confer any privilege to the executive branch).
[39] *See, e.g.*, Michael W. McConnell, *Why Is Religious Liberty the "First Freedom"?*, CARDOZO L. REV. 21, 1243, 1244 (2000)
[40] Michael W. McConnell, *Religion and Its Relation to Limited Government*, 33 HARV. J.L. PUB. POL'Y 943, 948 (2010) ("The idea of the separation between church and stat maps closely onto the idea of limited government.").
[41] Russell Hardin, *Why a Constitution*, *in* SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 51, 66 (Denis J. Galigan & Mila Versteeg eds., 2013) ("A typical reason for having a constitution is to place limits on government. Indeed, 'constitutional government' is commonly taken to mean limited government.").
[42] McConnell, *supra* note 39; *see also* Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L. J. 1236, 1243-44 (2010) (noting that religion may serve as a "powerful source of extrapolitical authority").
[43] Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 Yale L. J. 1236, 1245 (2010).

The right of privacy (and therefore the right to abortion) also serves as a limit on state power.[44] As constitutional scholar Jed Rubenfeld frames it, "[t]he right to privacy exists because democracy must impose limits on the extent of control and direction that the state exercises over the day-to-day conduct of individual lives."[45] In the same way religion is a means of self-actualization and self-determination which enables one to reject over-encroachment of state, so too is ability to decide if and when you will become a parent. Certain identities are so important to the person—like religion or the decision to become parent—that you cannot by virtue of state fiat impose those identities onto individuals. These identities must be freely chosen, or they do not have meaning for the individual. If they are imposed by state compulsion, they are not meaningful in terms of *self*-determination.

Religious liberty and abortion are fundamental rights because there is a right to self-determination.[46] The decision to have an abortion is so fundamental to self-actualization and ability of an individual to be a fully formed citizen that they cannot be made in an environment in which the state is compelling it. For the same reason we protect religion as fundamental, we must protect abortion, a private decision of intimate life, in the same way.[47]

We must see religion and abortion as coextensive and consistently fundamental; both are fundamental rights. Once we have determined that they are both entitled to treatment as fundamental rights, we must equally balance those fundamental rights against the state's interest

[44] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").
[45] Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 805 (1989).
[46] Angela R. Krauss, *Abortion and Privacy: A Woman's Right to Self Determination*, 10 SW. U. L. REV. 173, 179 (1978) ("The Court's decisions in *Eisenstadt*, *Roe*, and *Doe* were particularly important because they recognize a women's personal right of privacy self-determination in the areas of contraction, and abortion.").
[47] Brian T. Ruocco, Comment, *Our Antitotalitarian Constitution and the Right to Identity*, 165 U. PA. L. REV. 193, 194 (2016) ("Under the letter and spirit of the Constitution, the United States government cannot define, regulate, or compel aspects of life that are fundamental to identity and personhood. It cannot occupy our lives or enforce conformity and subservience to the State in the way a totalitarian government would.").

in a public health crisis. Irrespective of their delineation in the Constitution (or lack thereof), the rights to religious liberty and abortion serve the same purpose: creating a special equal status that must be used to review limitations on the rights.

As it currently stands, courts fail to afford abortion and religious liberty an equal status of review.[48] This is, in part, because the outdated *Jacobson* standard gives courts too much discretion regarding its implementation. The lack of a clear rule has resulted inconsistent application, reflecting conservative inclinations to protect religious rights while upholding limitations on the abortion right. In an effort to protect the American value of self-determination[49] and the role it plays in the courts, a clear and consistent *Jacobson* standard must be defined.

III. Fixing The Threat to Constitutional Rights

Categorizing the fundamental rights to abortion and free exercise of religion as serving an anti-totalitarian purpose requires consistent protection of the rights by the judiciary.[50] As modern medicine has evolved, the threats to public health of the 1900s became less of an issue, losing predominance in our courts.[51] COVID-19 marks a reemergence of tension between constitutional rights and state police power reminiscent of the *Jacobson* era. As these cases concerning these

[48] *See supra* Sections I.B, I.C.
[49] In a document describing American values, the U.S. Department of State writes that "Americans value independence and self-determination, placing importance on the role of the individual in shaping his or her own identity and destiny through one's choices, abilities, and efforts." *So You're an American? A Guide to Answering Difficult Questions Abroad,* U.S. Dep't. of State 1, https://www.state.gov/courses/answeringdifficultquestions/assets/m/resources/DifficultQuestion (last visited Dec. 1, 2021).
[50] *See* Rubenfeld, *supra* note 45 (noting that the "judiciary is an appropriate body to determine whether the law transgresses these implicit limits").
[51] Wendy E. Parmet, *From Slaughter-House to Lochner: The Rise and Fall of the Constitutionalization of Public Health*, 40 Am. J. L. Hist. 476, 495, 502 (1996) (claiming that the transition from epidemic health threats to chronic health threats constitutionalized public health police power).